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RESUME

La Compagnie d'Amarrage (Trois-Rivières) Ltée, Compagnie d'Arrimage Trois-Rivières Ltée, J.C. Malone et Compagnie Ltée, Les Élévateurs de Trois-Rivières, Somavrac Inc. et Terminaux Portuaires du Québec, employeurs, Association des employeurs maritimes, représentant patronal, Syndicat des débardeurs de Trois-Rivières, section locale 1375 (SCFP), syndicat accrédité, et Société du parc industriel et portuaire de Bécancour (auparavant, Société du parc industriel du centre du Québec), requérante en intervention.

Dossier du Conseil:
555-3208

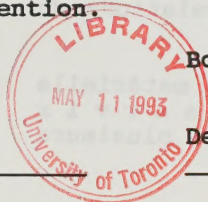
Décision n°: 968

SUMMARY

Moorings (Trois-Rivières) Ltd., Compagnie d'Arrimage Trois-Rivières Ltée, J.C. Malone and Company Ltd., Les Élévateurs de Trois-Rivières, Somavrac Inc. and Quebec Ports Terminals, employers, Maritime Employers' Association, employer representative, Syndicat des débardeurs de Trois-Rivières, Local 1375 (CUPE), certified union, Société du parc industriel et portuaire de Bécancour (formerly Central Quebec Industrial Park Corporation), intervening applicant.

Board File:
555-3208

Decision no.: 968



Secteur du débardage. Accréditation multipatronale en vertu de l'article 34 du Code canadien du travail (Partie I - Relations de travail), tel qu'il a été modifié en décembre 1991. Désaccord entre employeurs sur le choix d'un représentant. Désignation par le Conseil selon le paragraphe 34(4). Première application de cette nouvelle disposition. Critères d'application. Désignation pour les ports de Trois-Rivières et de Bécancour, au Québec.

Longshoring industry. Multi-employer certification pursuant to section 34 of the Canada Labour Code (Part I - Industrial Relations), as amended in December 1991. Employers failed to jointly choose a representative. Appointment by this Board pursuant to section 34(4). First application of new provision of the Code. Application criteria. Employer representative selected for ports of Trois-Rivières and Bécancour, Quebec.

Par suite de l'accréditation du SCFP le 12 juin 1992, (Terminaux Portuaires du Québec et autres (1992)), décision du CCRT n° 967, non encore rapportée), le Conseil a ordonné aux employeurs de choisir collectivement un représentant selon l'alinéa 34(3)a) du Code. La plupart des employeurs ont choisi l'Association des employeurs maritimes (AEM). TPQ, un employeur de Bécancour, a proposé une firme de relations industrielles étrangère au secteur du débardage. Un autre employeur s'est abstenu.

Voici les six facteurs dont le Conseil tiendra compte avant de rendre une décision:

1. la volonté exprimée par les différents employeurs de l'unité;
2. l'expérience dans le secteur du débardage ou dans un autre secteur jugé comparable en matière de relations du travail;
3. la capacité matérielle de desservir efficacement plusieurs employeurs;
4. la capacité d'assumer les obligations patronales existantes, y compris la sécurité d'emploi et le déploiement de la main-d'oeuvre;
5. la présence de mécanismes susceptibles de permettre aux employeurs individuels de s'exprimer et de faire valoir leurs besoins et, le cas échéant, de décider efficacement des différends pouvant opposer des employeurs;

Following the certification of CUPE on June 12, 1992, (Quebec Ports Terminals (1992)), as yet unreported CLRB decision no. 967), the Board directed the employers to jointly choose a representative pursuant to section 34(3)(a) of the Code. Most of the employers chose the Maritime Employers' Association (MEA). TPQ, an employer from Bécancour, chose an industrial relations consulting firm that had not been involved in the longshoring industry. Another employer abstained.

The Board listed six factors it will take into account before decision:

1. the preferences expressed by individual employers in the unit;
2. experience in the longshoring industry or in another industry deemed relevant for labour relations purposes;
3. the physical capacity to serve efficiently several employers;
4. the ability to assume existing employer obligations, including job security and the dispatch of longshoremen;
5. the existence of mechanisms to permit the expression of the individual views and needs of employers and to provide for the efficient resolution of disputes that may arise between them;

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6. la capacité de prendre immédiatement en charge les obligations prévues par le Code, notamment celle de négociier de bonne foi.

Après analyse de la preuve, le Conseil a désigné l'AEM pour représenter tous les employeurs liés par le certificat d'accréditation.

6. the ability to take on at once the obligations imposed by the Code, including the duty to bargain in good faith.

After examining the evidence, the Board appointed the MEA as representative for all the employers covered by the certification.

Canada
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Canadien des
Relations du
Travail

Reasons for decision

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Ltd.,
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Les Elévateurs des
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Somavrac Inc. and
Quebec Ports Terminals Inc.,

employers,

and

Maritime Employers'
Association,

employer representative,

and

Syndicat des débardeurs de
Trois-Rivières, Local 1375
(CUPE),

certified union,

and

Société du parc industriel et
portuaire de Bécancour
(formerly Central Quebec
Industrial Park Corporation),

intervening applicant.

Board File: 555-3208

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Messrs. J. Jacques Alary and François Bastien, Members.

Appearances

Mr. Gérard Rochon and Ms. Manon Savard, accompanied by
Mr. Serge Dubreuil (Moorings (Trois-Rivières) Ltd. and
J.C. Malone and Company Ltd.), Mr. Pierre Paquin
(Somavrac Inc.), Mr. Stan Laughrea (Les Elévateurs des
Trois-Rivières), and Mr. Brian Mackasey (Maritime
Employers' Association), for the above-mentioned
parties;

Messrs. Raynold Langlois, Q.C., and Laurian Barré,
accompanied by Messrs. Claude Desgagnés, Executive
Vice-President of QPT, Alphonse Bélanger and Jean
Gaudreau, for Quebec Ports Terminals Inc.;

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Gaudreau, for Quebec Ports Terminals Inc.;

Messrs. Jean Bazin, Q.C., Denis Manzo and Guy Lavoie, for the Société du parc industriel et portuaire de Bécancour; and
Mr. Manuel Gordon, for Compagnie d'Arrimage Trois-Rivières Ltée.

Not appearing

Syndicat des débardeurs de Trois-Rivières, Local 1375 (CUPE), certified union.

These reasons for decision were written by Mr. Serge Brault, Vice-Chairman.

I

THE PROCEEDINGS

This decision is further to a certification order issued on June 12, 1992 in the name of the Syndicat des débardeurs de Trois-Rivières, Local 1375 (CUPE), (the union or CUPE), under section 34(1) of the Canada Labour Code (Part I - Industrial Relations) (file 555-3208). The reasons for this order are set forth in Terminaux Portuaires du Québec Inc. et autres (1992), as yet unreported CLRB decision no. 967. In this same order, the Board, acting pursuant to the new text of section 34(3)(a) of the Code (as amended by section 1 of Bill C-44, An Act to Amend the Canada Labour Code (geographic certification), 3rd Sess., 34th Parl., enacted on November 29, 1991 and proclaimed on December 5, 1991), ordered the employers of the longshoremen in the ports of Trois-Rivières and Bécancour, Quebec, to jointly choose an "employer representative" and inform the Board of their choice not later than June 25, 1992. The Board also took this opportunity to warn the employers that should they fail to agree on the choice of a representative within the time period specified, the Board would appoint an "employer

representative" pursuant to section 34(4) of the Code, as amended by the above-mentioned Bill C-44:

"34.(4) Where the employers fail to comply with an order made under paragraph 3(a), the Board shall, ... by order, appoint an employer representative of its own choosing."

Since the employers had not jointly chosen their representative within the time period specified, the Board convened a hearing in Ottawa on June 26, 1992 and in Montréal on July 27 and 28, 1992. The Board then gave the employers covered by the June 12 order the opportunity to submit their arguments on the appointment of an "employer representative," which the Board must now proceed to appoint.

II

THE EMPLOYERS AFFECTED

In its June 12 order, the Board identified the employers covered by the geographic certification issued in the name of CUPE. There were then five.

1. Compagnie d'Arrimage Trois-Rivières Ltée (Arrimage TR)
2. J.C. Malone and Company Ltd. (J.C. Malone)
3. Les Elévateurs des Trois-Rivières (ETR)
4. Somavrac Inc. (Somavrac)
5. Quebec Ports Terminals Inc. (QPT)

The June 12 order remained posted in the ensuing days in the principal work places on both shores. The Board then granted leave to appear before it to another company, Moorings (Trois-Rivières) Ltd. (Moorings), which also described itself as an affected employer.

Moorings' status as an employer was challenged, especially since it had not come forward during the initial phase of the certification proceedings (see Terminaux Portuaires du Québec Inc. et autres (967), supra). Some were of the opinion that Moorings was merely another corporate name for J.C. Malone, which was already represented in these proceedings.

Moreover, ETR's status as an employer was also challenged because it uses, at present, the services of another company, J.C. Malone, to do its own longshoring in Trois-Rivières (regarding the activities of ETR, see Les Elévateurs des Trois-Rivières (division de ULS Corporation) et autres, December 6, 1991 (LD 964)).

After hearing the arguments and reviewing the evidence, the Board, acting pursuant to section 16(p)(i) of the Code, concluded that ETR is an employer covered by CUPE's certification because it participated, with the agreement of all parties, in the 1990-91 negotiations and because it operates in Trois-Rivières where it has major facilities and regularly transships grain, coke and alumina, activities that are covered by another certification order. However, all of ETR's longshoring activities per se are covered by CUPE's certification. In fact, during the 1990-91 strike, ETR performed its own longshoring work and has continued to do so since the end of the labour dispute. The current hiatus in its longshoring activities is merely temporary and, in the Board's view, does not affect its status as an employer covered by the June 12, 1992 order.

We make the same finding in the case of Moorings (not to be confused with Arrimage TR). It and J.C. Malone certainly have close ties, which may explain why Moorings kept quiet until now. In any case, it has now spoken up. The evidence showed that it was already a separate employer under the old

collective agreement for Trois-Rivières and has remained so. This is sufficient to recognize its status as an employer covered by our June 12 decision.

III

OTHER INCIDENTAL QUESTIONS

Two requests for adjournment were made at the hearings held in June 1992 and were dealt with immediately by the Board.

First, the Société du parc industriel et portuaire de Bécancour (the Société) sought an adjournment to enable it to file a request to intervene in the present proceedings dealing with the appointment of an "employer representative." Then, QPT also sought an adjournment on the ground that counsel for the MEA were in a conflict of interest. These two requests were dismissed during the hearing.

The Société had already been denied interested party status in May 1992 during the initial phase of CUPE's certification proceedings (see Terminaux Portuaires du Québec Inc. et autres (967), supra). Having retained new counsel in June, it appeared at the hearing on June 26. Counsel for the Société then orally requested that the Board adjourn its proceedings on the ground that he intended to file another request to intervene on behalf of his client. Moreover, counsel also indicated that he had just received the file from his predecessor. Finally, he indicated that his client had not ruled out the possibility of contesting, by way of judicial review, both the Board's decision of the previous May to deny it interested party status and the June 12 certification.

The Board refused to stay its hearings. It pointed out that the decision not to grant the Société interested party status had been made back in May and that this was a final decision that no one had challenged. The Board added that, according to its Regulations, it did not have before it a new request to intervene, and that it would decide such a request in due course, if indeed one were filed.

In fact, a written motion to intervene was filed before the hearings held in July 1992. After hearing the parties, the Board reaffirmed, over the objections of counsel for the Société, its decision not to grant the Société employer status for the purposes of section 34(4). The Board nevertheless allowed it to intervene, to a limited extent, during presentation of arguments.

As for the request filed by QPT, its counsel sought an adjournment on June 26 because, they alleged, their fellow counsel, Mr. Rochon and Ms. Savard, acting for the MEA and a number of the employers in Trois-Rivières, were in what they termed an obvious conflict of interest.

Mr. Langlois based his objection on the need for the eventual "employer representative" to be completely impartial and independent of the employers it would have to represent. In these circumstances, argued Mr. Langlois, the MEA could not act on behalf of certain employers affected by the present appointment proceedings without, in so doing, putting itself in a conflict of interest. Consequently, the MEA could not, under section 6 of the Board's Regulations, appear in these proceedings on behalf of four of the six employers and at the same time be their candidate for appointment as "employer representative." Mr. Rochon and Ms. Savard, who have long represented the MEA in all the ports where it is designated "employer representative," were themselves precluded, argued Mr. Langlois, from representing

these four employers individually. By representing the interests of both the MEA and these employers, Mr. Rochon and Ms. Savard had put themselves in a conflict of interest.

Mr. Langlois concluded by asking the Board to adjourn its hearing to enable these employers to retain new counsel.

The Board denied the request. It considered Mr. Langlois' objection without merit because it was based on a particular interpretation of the concept of "employer representative" within the meaning of section 34, a matter which the Board had yet to determine. Moreover, even if the criteria of independence, impartiality, loyalty and trust were applied to the choice of an "employer representative" by the Board in accordance with section 34(4), the Board did not see how these criteria could preclude the employers from appearing through the person of their choice under section 6 of the Board's Regulations.

There were, however, other considerations. Section 8 of the Code recognizes every employer's right to belong to the employers' organization of its choice and to participate in its lawful activities. The Board did not see how membership in an employers' organization such as the MEA would preclude member employers authorizing this organization to represent them before the Board because the organization is also being proposed as their "employer representative" for the purposes of section 34 of the Code. Even allowing that this dual role could disqualify the MEA as a potential "employer representative," this did not mean that it could no longer appear on behalf of the members of its organization or provide them with the services of its legal counsel.

IV

EVIDENCE

The Code stipulates that the Board shall not appoint an "employer representative" until it has given the employers the opportunity to "make representations." The Code does not therefore require that a public hearing be held. We nevertheless decided to invite those employers wishing to do so to adduce evidence. This proved to be very useful, especially since this is the first time the Board has appointed a representative under section 34(4). The Board also had at its disposal all the evidence heard during the initial phase of this case.

In the days preceding the hearings, the Board received a summary of the arguments that the employers intended to present. It was not at all surprised to note that the same groups who opposed one another during the initial phase of CUPE's certification proceedings were again facing off over the choice of an "employer representative" (see Terminaux Portuaires du Québec Inc. et autres (967), supra).

Essentially, on one side is QPT, supported by its affiliate, Arrimage TR. It opposes the idea of confirming the MEA as "employer representative." QPT and Arrimage TR support Aimé Bédard & Associés, an industrial relations consulting firm. On the other side are the four employers in Trois-Rivières that are already represented by the MEA and that have reaffirmed their confidence in it and their wish that it be appointed "employer representative."

The evidence heard dealt, among other things, with the experience and expertise of each of the proposed employer representatives.

Aimé Bédard is an industrial relations consultant to a number of companies in Quebec. Neither he nor his firm has ever engaged in collective bargaining in the longshoring industry. Mr. Bédard is unaware of all the problems experienced between the players in the longshoring industry in the ports of Trois-Rivières and Bécancour. Mr. Bédard has never examined the existing collective agreements, but says that he possesses, or could recruit, the personnel competent to administer them. Mr. Bédard is not familiar with the dispatch system used in the longshoring industry. Aimé Bédard & Associés was recruited by Laurian Barré, counsel for QPT. Mr. Bédard does not work for any of the companies he would have to represent; he does not know them.

The MEA, need we repeat, was created for all practical purposes with the introduction of multi-employer bargaining in the St. Lawrence ports two decades ago. It succeeded the Shipping Federation. Numerous Board decisions describe not only the rationale for it, but also every detail of this employer grouping (Terminaux Portuaires du Québec Inc. et autres (967), supra). The MEA is a non-profit corporation that administers, among other things, a job security fund for all St. Lawrence ports where it is present. The MEA also described the specialized personnel it employs and its longshoring activities in the St. Lawrence ports. As we said, as a result of the enactment of section 4 of the above-mentioned Bill C-44, it was the "employer representative" of all the employers of longshoremen in the ports of Trois-Rivières and Bécancour under the certification issued in 1987 in the name of the ILA (Terminaux Portuaires du Québec Inc. et autres (967), supra). It is also the "employer representative" of the employers of longshoremen in the ports of Montréal and Québec under other certifications. The transitional provision in question reads as follows:

"4. Agents appointed under section 34 of the Canada Labour Code, as that section read immediately before the coming into force of this Act, shall be deemed to be employer representatives appointed under that section as amended by section 1 of this Act."

It is a euphemism to say that, more than once in recent years, QPT and the MEA have not seen eye to eye. A number of witnesses testified concerning relations between QPT and the MEA. QPT managers related incidents in which QPT, represented by the MEA in spite of itself, had many criticisms of it.

The Board has already examined the corporate relationship between QPT and Arrimage TR. Manuel Gordon, one of the principal officers of Arrimage TR, testified concerning this relationship. The Board also heard evidence concerning the close corporate relationship between QPT and Société d'Amarrage de Québec, its parent company and the principal employer in the port of Québec (see Maritime Employers' Association and Terminaux Portuaires du Québec (1987), 65 di 162; and 19 CLRBR (NS) 34 (CLRB no. 642); and Terminaux Portuaires du Québec Inc. et autres (967), supra).

Mention was also made of the circumstances of the signing by the MEA and CUPE of a collective agreement covering the ports of Trois-Rivières and Bécancour in April of this year. QPT also drew attention to what it regarded as the partisan, arbitrary and disrespectful attitude of the MEA. It also pointed out that the MEA represents employers in almost all St. Lawrence ports where there are multi-employer certifications under section 34.

Arrimage TR was not represented at this stage of the proceedings by counsel, as it was earlier on. Mr. Gordon, who heads this company, is also an officer of the MEA. He also heads a sister company in the port of Montréal which has long been a member of the MEA. At our invitation, he appeared and testified concerning the undue pressure to

which he was allegedly subjected within the MEA because of his position in the present proceedings.

Mr. Gordon has chaired the MEA's Finance Committee for a number of years. This committee is responsible, among other things, for determining the assessments to be collected from the employers belonging to the MEA. Its recommendations are forwarded to the MEA's board of directors which makes the final decision. This committee is made up of employers. These assessments are based on tonnage handled. Their purpose is to pay the costs of negotiating and administering the collective agreements and in particular of their job security provisions (see in this regard Maritime Employers' Association and Terminaux Portuaires du Québec (642), supra).

According to Mr. Gordon, the MEA is too centralized and dominated by bureaucrats insensitive to regional needs. Mr. Gordon expressed the view that an individual employer was incapable of influencing the attitudes or policies of the MEA. The latter were defined as unrealistic, often realized at the expense of the small ports. This resulted in the concluding of collective agreements that jeopardized the competitiveness of ports like Montréal and especially Trois-Rivières which lagged behind Montréal. He spoke of ruinous employer assessments imposed by the MEA, in particular in Québec. However, he admitted under cross-examination that the most recent assessments approved by the board of directors for the port of Québec had been recommended by his committee.

The MEA described its efforts in Trois-Rivières and Bécancour in recent years to accommodate at the bargaining table the local employers as a whole, including

QPT, while at the same time trying to meet their individual expectations. Its principal managers also gave their version of certain discussions or disputes between them and QPT or its parent company, Société d'Amarrage de Québec, particularly in the port of Québec.

Finally, the evidence revealed that, no matter how many employers operate in the port of Trois-Rivières, the majority supports the MEA.

V

ARGUMENTS

On the parliamentary debates

Counsel debated the relevance for the Board of relying on parliamentary debates in interpreting and applying the new provisions of section 34 of the Code. As the Board has noted previously (Terminaux Portuaires du Québec Inc. et autres (967), supra), not one party disputes the fact that these provisions do in fact apply to these proceedings, even though they began before their enactment.

The Board has already referred to these parliamentary debates in Terminaux Portuaires du Québec Inc. et autres (967), supra. All it can do is refer the parties to the text of that decision. In any event, the Board believes that it is appropriate to examine the parliamentary debates that attended the enactment of the above-mentioned Bill C-44, "in order to ascertain the 'mischief' or 'evil' that a particular enactment was designed to correct" (Canada (Attorney General) v. Young, [1989] 3 F.C. 647; and (1989), 100 N.R. 333 (C.A.), pages 657; and 338).

On the merits

The Board did not relate all evidence adduced by the parties in these proceedings, nor does it intend to relate all their arguments. QPT submits that the replacement of the word "agent" with the words "employer representative" in section 34 does not alter the nature of the individual employer-representative relationship, which remains that of principal agent. Essentially, QPT objects to the appointment of the MEA. In its view, the employers' representative should have no ties whatsoever with the parties it represents, in order to ensure its impartiality. This is why QPT proposes the appointment of Mr. Bédard's firm which, it believes, has the necessary capabilities and is more likely to re-establish industrial peace.

The MEA's supporters, for their part, propose that the job be left to the MEA, citing the distinctiveness of the longshoring industry, the MEA's expertise and its experience.

A word about the Société. In his arguments, counsel for the Société stressed the need to ensure industrial peace and to act realistically to this end. According to him, the Board was obliged to disqualify the MEA, if for no other reason than the tension that had characterized the history of its relations with the port of Bécancour and with QPT. The Société even proposed itself as "employer representative," if the Board saw fit to appoint it.

This whole matter generated rather sharp exchanges between counsel for QPT and counsel for the MEA, before and even after the hearings. These exchanges illustrate, first, the emotion that this matter generates and, second, the impossibility for the employers to agree on the choice of a

representative. Consequently, it merely remains for the Board to discharge its statutory duty and appoint this representative itself.

VI

THE LAW

Who to choose and according to what criteria?

The Board's responsibility under section 34(4) is not to choose between the candidates proposed by the competing parties. Its choice is not subject to the wishes ultimately expressed by the majority of employers, even if their wishes are a consideration. It must decide independently. If the appointment were subject to the employers' wishes, the majority could, for example, simply not appoint anyone, in order to paralyse the certification process, or each employer could simply propose itself to achieve the same result.

The Board must, in the final analysis, appoint as "employer representative" the party it deems qualified to act in this capacity. First, the representative must be able to fulfil all obligations that Part I of the Code imposes on an employer, including its obligations under section 34(5) as "employer representative." One of these obligations, bargaining in good faith with the bargaining agent with a view to entering into collective agreements in an orderly fashion, is fundamental to the achievement of industrial and social peace. It was, moreover, in the interest of maintaining this industrial and social peace that Parliament established this special system of industry-wide bargaining in 1973 and clarified it on December 5, 1991.

In developing objective criteria for determining the appropriate "employer representative," the Board, with

respect, sees no value in relying at all on the traditional notions of "mandate" in civil law and "agency" in common law. The amendments of December 5, 1991 to the special system of industry-wide bargaining eliminated the ambiguities arising from the use of the word "agent" in the old text. The Superior Court, relying specifically on the rules governing "mandate," issued, before these amendments came into force, an interlocutory injunction and a permanent injunction, the effect of which was to give QPT a right of veto over the signing of any collective agreement between the ILA and the MEA (Terminaux portuaires du Québec Inc. c. Association des employeurs maritimes, no. 500-05-009311-885, November 9, 1988 (Que. S.C.)).

Our analysis of the legislation enacted following these injunctions reveals that the replacement of the word "agent" with the words "employer representative," and the clarifications made to the powers of this representative, reflect Parliament's intention to create a special system in keeping with the autonomy that characterizes collective labour relations legislation. Thus, under section 34(5), the "employer representative" appointed is explicitly invested by the Code, and not by the employers it represents, with the power to bind all employers in the unit, including necessarily those that had not proposed it as representative. Its appointment alone empowers it to negotiate and sign a collective agreement on behalf of the employers it represents. This is the very essence of industry-wide or geographic bargaining. The representative, however, cannot act arbitrarily.

The especially delicate role that the "employer representative" is called upon to play makes it even more imperative, in the Board's opinion, that this representative be chosen on the basis of carefully defined objective criteria. In this regard, we find it useful to refer to

section 34(6) of the Code which imposes a statutory duty of fair representation on employer representatives (and on agents appointed under the old system under the terms of section 4 of the above-mentioned Bill C-44). This text sets out minimum standards of conduct for employer representatives:

"34.(6) In the discharge of the duties and responsibilities of an employer under this Part, an employer representative, or a person acting for such a representative, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers on whose behalf the representative acts."

Thus, all employers covered by a multi-employer certification enjoy the protection of section 34(6). They therefore have the possibility of making a complaint against an "employer representative" that allegedly acts in a manner that is arbitrary or discriminatory. Section 97(1)(a) of the Code, as amended, so provides:

"97.(1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

(a) an employer, a person acting on behalf of an employer, ... has contravened or failed to comply with subsection ... 34(6) ..."

If this duty is breached, the Board can exercise the remedial powers contained in the new section 99(1)(a.1):

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection ... 34(6) ... the Board may, by order, require the party to comply with or cease contravening that subsection ... and may:

...

(a.1) in respect of a contravention of subsection 34(6), by order, require an employer representative to take and carry on on behalf of any employer affected by the contravention, or to assist any such employer to take and carry on, such action or proceeding as the Board considers that the representative ought to have taken and carried on on the employer's behalf or ought to

*have assisted the employer to take and carry on;
..."*

It is in this very special context, and bearing in mind the objectives of the legislation and the suggestions of the parties, that the Board is finally defining, without unduly restricting itself, six criteria or factors to be considered when appointing an "employer representative." The Board wishes to make clear that these criteria are not listed in order of importance. Their importance will undoubtedly vary depending on the proceedings, but on the whole, they are sufficiently reliable bench marks. They are as follows.

1. The wishes expressed by the various employers of the employees in the unit concerned.
2. Relevant experience in the longshoring industry or in an industry considered comparable from the standpoint of labour relations.
3. The material resources to serve effectively and expeditiously a plurality of employers.
4. The ability to assume existing employer obligations, in particular, if necessary, job security and the dispatching of workers.
5. The presence of mechanisms through which individual employers can express their concerns and, if necessary, effectively resolve disputes between them.
6. The ability of the representative chosen to discharge forthwith its obligations under the Code, in particular the obligation to bargain in good faith.

QPT suggests that one of the key criteria to be considered should be the absence of any previous relationship between the aspiring "employer representative" and the employers it would be called upon to represent. This criterion, it argues, would ensure greater impartiality and neutrality on the part of the "employer representative."

With all due respect for the opposing opinion, we cannot accept this criterion because it not only unduly limits the employers' freedom of choice, but also could produce absurd results. In fact, although the Code clearly stipulates that an appointed "employer representative" shall not act in a manner that is discriminatory, arbitrary or in bad faith in the representation of any of the employers on whose behalf it acts, it does not prohibit the eventual representative from having had any relationship with one or another of the employers it may be called upon to represent. To impose such a condition would mean in practice that an "employer" of the employees in the bargaining unit could never be chosen by its peers or by the Board as "employer representative." The same could probably be said of an "employers' organization" within the meaning of the Code because we cannot see such an organization not having ties with its members:

"'employers' organization' means any organization of employers the purposes of which include the regulation of relations between employers and employees."

(section 3 of the Canada Labour Code)

The employers' choice would also be limited in raiding proceedings. In fact, employers would be precluded from proposing the reappointment of the incumbent "employer representative" because of the ties that it inevitably would have developed during the preceding certification. They would thus be forced, with each new certification, to choose

or propose to the Board a representative that would, in short, be unknown to them, in order to maintain its impartiality.

This would be a very heavy price to pay when section 34(6) unquestionably satisfies to a large extent QPT's concern about receiving equitable representation from the appointed "employer representative."

A final legal argument against QPT's suggestion is also based on the new section 34. This text makes no distinction between a person qualified to become a "representative" through selection by the employers in accordance with section 34(3)(a) and someone who could be so appointed by the Board should the employers fail to agree. If the Code does not make this distinction, then it is not up to the Board to do so.

VII

ANALYSIS

The Board is exercising discretion here. It does not have to choose sides. It must appoint a representative. One option open to it is to appoint one of the persons proposed by the employers. To this end, the Board must first determine whether the candidates proposed by the parties meet the criteria listed above and, on the whole, to what extent they meet them.

Bédard's firm

Bédard's firm, which was recruited and proposed by QPT, is also supported by Arrimage. The other employers oppose its appointment.

According to QPT and Arrimage, this firm's strongest asset is its general expertise in labour relations combined with its lack of knowledge of the longshoring industry, its distinctive features and its problems. This lack of knowledge, they argue, would guarantee its impartiality.

In 1985, Mr. Bédard was vice-president of human resources at Marine Industries. He admitted, however, that he knows nothing about the longshoring industry. Some of his associates acquired their experience on large construction sites such as D.V. Ship, Norsk Hydro Canada Inc., ABI and SIDBEC-DOSCO. An associate apparently knows a little about longshoring, but no more. Mr. Bédard is not familiar with the Canada Labour Code or the specific obligations that it would impose on him as "employer representative."

The firm has no office in the region or personnel who could administer the collective agreement covering Trois-Rivières, in particular its safety and health, dispatch and job security provisions.

Mr. Bédard knows nothing about the existing collective agreements. He does not know the employers and has never dealt with them. Nor is he aware of the particularly stormy history of labour relations in this region.

Mr. Bédard proposed no mechanism to reconcile and arbitrate the differing opinions and interests of the employers he would have to represent.

Although the firm has some experience in an industry comparable with longshoring, i.e., the construction industry, it does not meet all the other above-mentioned criteria to qualify for appointment as "employer representative."

MEA

Four of the six employers of employees in the unit support the MEA.

The MEA is an employer organization within the meaning of the Code which specializes in labour relations in the marine transportation industry, including longshoring. A well-established organization, it has the personnel, the experience and the services necessary for negotiating and administering collective agreements. This is its raison d'être.

To the extent that the MEA has been administering and negotiating collective agreements in Trois-Rivières for years and has also been negotiating for both Trois-Rivières and Bécancour since 1987, its thorough knowledge of the expired collective agreements and of the expectations of each is beyond question. The same is true of its ability to fulfil the obligations imposed by the Code, including the obligation to bargain in good faith.

The evidence heard concerning the negotiations undertaken by the MEA demonstrates, in our opinion, that it has done all that could reasonably be expected of a representative, in the circumstances, to try and achieve a consensus among the employers.

The MEA's structure is geared to decision making and the distinctive features of the industry. This case, in fact, has enabled us to review the MEA's statutes and by-laws. They contain the mechanisms through which individual employers can express their concerns and through which differences between employers can be effectively arbitrated, in particular collective bargaining disputes.

The Board has certainly heard discordant notes concerning the operation of the MEA and we have taken them into consideration. Having said this, the Board notes that the MEA has been bound since December 1991, in a number of ports, by the duty of representation imposed by section 34(6).

In the Board's view, the MEA satisfactorily meets the criteria defined earlier.

Société du parc industriel et portuaire de Bécancour

The solution does not lie in appointing the Société du parc industriel et portuaire de Bécancour, as its counsel suggested. The management of this corporation demonstrated, in our view, that it lacked expertise in labour relations and it was not as candid in its presentation before the Board as one might have hoped (see Terminaux Portuaires du Québec Inc. et autres (967), supra).

VIII

THE APPOINTMENT

The longshoremen of Trois-Rivières and Bécancour, who have shown patience worthy of mention, need an employer counterpart who is able to negotiate and enter into a collective agreement without delay. It is also their right.

The MEA meets the criteria that the Board has adopted and is our choice as "employer representative."

When the Board has to define a bargaining unit or choose between different union representatives, it does so with the knowledge that some employees are opposed to its choice.


This is the very essence of our labour legislation based on representation monopolies. Once organized, the members of a unit must speak with one voice.

The MEA is structured so as to fulfil the obligations imposed by the Code, including the duty to represent fairly all employers it is called upon to represent. However, the MEA's conduct in fulfilling this duty can only be assessed in the light of the reasonable and genuine co-operation it receives from the employers concerned.

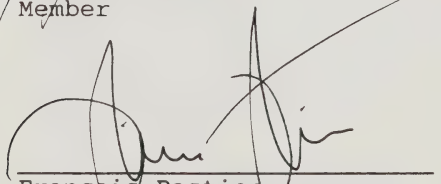
For all these reasons, the Board hereby appoints the Maritime Employers' Association as "employer representative" of all the employers covered by the certification issued to the Canadian Union of Public Employees on June 12, 1992. A formal order to this effect accompanies these reasons.



Serge Brault
Vice-Chairman



J. Jacques Alary
Member



François Bastien
Member

ISSUED at Ottawa, this 30th day of October 1992.

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Summary

GORDON D'ERI, COMPLAINANT, CANADIAN
UNION OF POSTAL WORKERS, RESPONDENT,
AND CANADA POST CORPORATION,
EMPLOYER.

Board File: 745-4170

Decision No.: 969

These reasons deal with the time
limits for filing a complaint with
the Board which are governed by
section 97(2) of the Canada Labour
Code (Part I - Industrial Relations).
In essence, these provisions
stipulate that complaints cannot be
filed beyond the period of 90 days
following the time when the
complainant knew or, in the opinion
of the Board, ought to have known of
the circumstances giving rise to the
complaint.

In this situation a complaint was
filed on February 10, 1992 in which
the complainant referred to events
about which he unquestionably knew in
October 1991. Further particulars
were then filed on August 11, 1992
just prior to the Board hearing the
matter. These new particulars went
to events that allegedly took place
in December 1991 and January 1992,
which would have been timely had they
been included in the original
complaint.

The complaint was dismissed as being
untimely. The Board ruled that the
complaint as filed in February 1992
was untimely, therefore, notwith-
standing that the Board had not
disposed of the matter, there was
nothing that was lawfully before the
Board that could be added to or
amended six months after the fact.

Résumé de Décision

GORDON D'ERI, PLAIGNANT, SYNDICAT DES
POSTIERS DU CANADA, INTIMÉ, ET
SOCIÉTÉ CANADIENNE DES POSTES,
EMPLOYEUR.

Dossier du Conseil: 745-4170

Décision n°: 969

Les présents motifs traitent des
délais à respecter aux fins du dépôt
d'une plainte devant le Conseil,
délais prescrits au paragraphe 97(2)
du Code canadien du travail (Partie I
- Relations du travail). En gros,
ces dispositions stipulent que des
plaintes ne peuvent pas être déposées
au-delà de la période de 90 jours
suivant le moment où le plaignant a
eu, ou selon le Conseil, aurait dû
avoir, connaissance des circonstances
ayant donné lieu à la plainte.

Dans une plainte déposée le 10
février 1992, le plaignant dans cette
affaire fait allusion à des
événements dont il était
manifestement au courant en octobre
1991. D'autres précisions ont été
déposées le 11 août 1992, peu de
temps avant la tenue de l'audience.
Ces précisions avaient trait à des
événements qui auraient eu lieu en
décembre 1991 et janvier 1992, et qui
auraient été considérés comme des
événements s'étant produits à
l'intérieur du délai de 90 jours,
s'ils avaient été inclus dans la
plainte initiale.

Le Conseil a jugé que la plainte dont
il avait été saisi en février 1992
avait été déposée hors délai et que
même s'il n'avait pas encore tranché
l'affaire, il n'avait rien devant lui
qu'il puisse légalement modifier ou
auquel il puisse légalement ajouter
quoique ce soit six mois plus tard.



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Reasons for decision

Gordon D'Eri,

complainant,

Canadian Union of Postal
Workers,

respondent,

and

Canada Post Corporation,
employer.

Board File: 745-4170

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Caroline A. Rowan, for the complainant;

David W.T. Matheson, for the Canadian Union of Postal
Workers; and

Ian Szlazak, for Canada Post Corporation.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with the timeliness of a complaint by Gordon D'Eri against the Canadian Union of Postal Workers (CUPW or the union) under the duty of fair representation provisions contained in section 37 of the Canada Labour Code (Part I - Industrial Relations).

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The time limits for the filing of such a complaint are set out in section 97(2) of the Code:

"97(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

Normally, the Board has little difficulty pinpointing the date that a complainant knew or ought to have known of the circumstances giving rise to a complaint. Untimely complaints can and usually are screened out by the Board without the need for time-consuming and costly public hearings (see Gordon Duncan McCance (1985), 61 di 49; 10 CLRBR (NS) 23; and 85 CLLC 16,042 (CLRBR no. 515) for an overview of how the Board processes section 37 complaints vis-à-vis its discretion under section 98(2) to dispose of them without a public hearing). In some instances, the question of when the complainant knew or ought to have known is clouded in disputed facts and a hearing therefore becomes necessary to unravel these facts to determine the date upon which the 90-day time limit had been triggered. In this particular case, a hearing was deemed necessary in the first place, not because of confusion over time limits, but rather because CUPW failed to respond to the complaint.

(For comments on the consequences of not replying to a section 37 complaint, see Peter Elcombe, (1992), as yet unreported CLRB decision no. 953).

To further complicate the issue of timeliness in this file, the facts and circumstances about which Mr. D'Eri was complaining were submitted in three phases. Some were filed with the complaint on February 10, 1992 which is the date of filing for the purposes of section 97(2). Further particulars were provided by Mr. D'Eri on May 20, 1992. Then, after he had retained counsel, more particulars were provided on Mr. D'Eri's behalf on August 11, 1992 shortly before the matter was heard at Toronto on August 20, 1992.

In the meantime, CUPW did file a brief response on June 4, 1992. However, the union did not refer to the timeliness of the complaint. In effect, the issue of the timeliness was therefore not squarely before the Board until the preliminary stages of the hearing on August 20, 1992. At that time, there were some comments by counsel for Mr. D'Eri about the unfairness of the union being allowed to raise this issue as a preliminary matter at the hearing so long after the complaint had been filed. To this, the Board responded by pointing out that time limits under section 97(2) are matters going to the very jurisdiction of the Board and which have to be addressed as a pre-condition to the Board dealing with any complaint affected by these provisions of the Code. This is true even if the parties do not raise the issue. Here, if CUPW had not addressed time limits, the Board would have raised this issue itself. (See David Coull (1992), as yet unreported CLRB decision no. 957).

Once raised, the Board heard submissions from the parties regarding the effect of section 97(2) on the circumstances surrounding the filing of this complaint. The Board then ruled that all of the facts and circumstances complained about in the complaint filed on February 10, 1992 were known to Mr. D'Eri prior to the 90 days preceding the date of filing. The complaint, as it related to these events, was therefore untimely. This ruling was given orally to the parties with a promise of reasons to follow.

The Board was then prepared to hear about the circumstances which counsel for Mr. D'Eri had filed on August 11, 1992, however, CUPW again raised section 97(2) as a jurisdictional bar to the Board proceeding. When it became apparent that counsel for Mr. D'Eri was at a disadvantage dealing with this issue on short notice, the hearing was adjourned to allow written submissions on this topic.

These written submissions were all in by September 14, 1992. On September 28, 1992, the parties were notified that the Board had found the whole complaint to be untimely. These are the Board's reasons for so finding.

II

Gordon D'Eri was employed by Canada Post Corporation (CPC or the employer) as a part-time letter carrier in June 1986. In December 1989, he was dismissed from his employment by CPC; however, following a successful grievance/arbitration he was reinstated on August 4, 1990.

Since then, Mr. D'Eri accuses his supervisors at CPC of embarking on a campaign of systematic disciplinary action which led to his dismissal for a second time in January 1992.

Let us point out immediately that a grievance has been filed regarding this dismissal and this matter is being taken by the union to arbitration. In fact, this arbitration was scheduled to commence on September 11, 1992, and we understand that continuation dates are ongoing. We highlight this to make it perfectly clear that the dismissal grievance is not a matter that is directly complained about in this section 37 complaint for the purposes of section 97(2). What Mr. D'Eri is concerned about is what he describes as his "unchallenged" disciplinary record since his reinstatement which could have a bearing on the outcome of the dismissal grievance. He contends that the union's failure to pursue numerous grievances on his behalf throughout 1991 constitutes a violation of section 37 of the Code.

With that in mind, we now turn to the complaint as it was filed on February 10, 1992. If we look to the Board Officer's report of May 26, 1992, we see that what Mr. D'Eri was complaining about at that time was summarized starting at page 2:

"On November 16th, 1990, he received a letter of discipline and a 5 day suspension for alleged delay of mail. He filed a grievance and alleges the union never processed it.

In March 1991, he received a letter of reprimand and serious warning for allegedly defacing mail and soliciting stamps from customers. He filed a grievance and alleges that the union did not process it.

On April 20th, 1991, he filed a grievance with his union steward against shortages in his pay and he alleges that the union did not process the grievance.

In April 1991, he received a 3 day suspension for allegedly deviating from his route. He filed a grievance and alleges that the union did not process it.

On June 12th, 1991, he filed a second grievance with the union steward against further pay shortage and again alleges that the union did not process his grievance.

On June 25th, 1991, he filed a third grievance against pay shortage and alleges that the union failed to process it.

In July 1991, he received a written reprimand for alleged misdelivery of mail. He filed a grievance and alleges that the union did not process it.

In July 1991, he received a 1 day suspension for allegedly leaving a car key in the back door of a Corporation vehicle. He filed a grievance and alleges that the union did not process it.

On September 13th, 1991, he attended an investigative hearing, with a union steward present, regarding 42 letters left unprocessed.

On September 19th, he filed a grievance with the union steward.

On September 24th, 1991, he received a letter from the area manager advising him he was to be suspended for five days, beginning October 21st to October 25th, inclusive.

On September 25th, he was presented with a letter signed by a union representative and a representative of the employer stating that the 5 day suspension was not grievable. The complainant refused to sign the letter and wanted to file a grievance.

On October 3rd, he filed a second grievance against the suspension.

On October 11th, 1991, he received a hand written letter from the union steward (Mr. W. McChesney) refusing to submit his grievance."

When that summary of events is compared with Mr. D'Eri's complaint as submitted, all points that he raised are covered. Taking those as the facts and circumstances relied upon to found the complaint,

it is readily apparent that all of these circumstances occurred well before the 90 days preceding February 10, 1992. Furthermore, Mr. D'Eri was unquestionably aware on October 11, 1991 that the union was not proceeding with his grievance over the five days suspension imposed on September 25, 1991. The note to Mr. D'Eri dated October 11, 1991 signed by the union representative Mr. McChesney was clear and unequivocal. The grievance was not going to be processed. The union had settled this matter on the basis of the suspension (obviously to avoid dismissal at that time) and it was not prepared to move from that position. As that was the latest matter complained about by Mr. D'Eri on February 10, 1992, the complaint as submitted was therefore untimely on its face.

The fact that Mr. D'Eri referred to all of those events in the context of his January 1992 dismissal does not alter the time limits or make them timely. Those circumstances for which time limits under section 97(2) had already expired, could not be resurrected and made timely by attaching them to a timely event such as the dismissal. This becomes even clearer in this case when one considers that the dismissal itself is not a factor in the complaint. As we pointed out earlier, a discharge grievance was filed on Mr. D'Eri's behalf on February 4, 1992 and it was not in question vis-à-vis the union's duty of fair representation at the time the complaint was filed six days later. As it turned out, the grievance was referred to arbitration by the union on March 12, 1992 so there was really nothing to complain about vis-à-vis the discharge grievance at that stage of the proceedings.

Let us be very clear; we are not saying that had the union refused to take the discharge grievance to arbitration and Mr. D'Eri had complained, that the union's conduct in handling all of his grievances including those listed above, could not be taken into account when the Board was assessing whether the union had fulfilled its obligations under section 37 of the Code. Of course they could. The Board does this regularly in unfair labour practice complaints against employers. In those situations, events forming the overall picture from which anti-union animus can be inferred are taken into account, even if they occurred prior to the 90-day time limit. For obvious reasons, though, the Board could not make a finding of a violation of the Code and issue a remedial order for any specific circumstance for which the time limits have expired. The same principles apply here. However, the time limits for all of the circumstances complained about on February 10, 1992 had expired. There was simply nothing before the Board at that time which could found a lawful complaint.

III

Moving on to the second phase, i.e., May 20, 1992, when Mr. D'Eri provided additional particulars relating to a disciplinary interview that took place on November 14, 1990 that resulted in a five-day suspension. He also submitted a grievance fact sheet setting out the details of this incident that he claims was given to the union to take action, but nothing was done. Whether this was true or false, none of it adds anything to his complaint regarding

timeliness. All he did there was to provide documentation supporting his allegations but the incident referred to happens to be the first one mentioned in the excerpt from the Board Officer's report which was reproduced earlier. It took place some fifteen months before the complaint was filed which makes it the most untimely aspect of the whole complaint.

This brings us to August 11, 1992, when newly retained counsel for Mr. D'Eri submitted further particulars which were to be relied upon at the upcoming hearing. These related to incidents that allegedly occurred between December 10, 1991 and January 17, 1992 which the union was said to have failed to act upon.

Obviously, had Mr. D'Eri raised these matters on February 10, 1992, they would have been timely. He did not; therefore, in our opinion, by waiting until August 11, 1992, he lost his opportunity to do so. By the time he did complain about these incidents the window of timeliness had closed.

Once again, we must make certain that what we are saying is not misconstrued. Clearly, had Mr. D'Eri filed a timely complaint on February 10, 1992, there would have been absolutely nothing wrong with him adding to it later or amending it, subject of course to the Board's discretion to accept the new particulars or the amendment. In practice, this is usually a routine matter as the Board is very flexible in this regard, particularly when complaints are filed by lay people (see Lila K. Walker et al. (1988), 73 di 126 (CLRB no. 678)). However, an obvious key consideration in any of these situations is surely

that there must be something that is lawfully before the Board in the first place that is capable of being added to or amended. Here, notwithstanding that the Board had not yet disposed of the matter, there never was a lawful complaint before the Board. In the circumstances, it seems to us that a non-entity like the February 10, 1992 complaint simply cannot be transformed into a timely complaint by the addition of timely particulars six months after the fact. By then, the time limits applicable to the events sought to be added had in themselves long since expired.

Moreover, while we are not looking at the merit of the complaint, when one looks closely at the particulars provided in August 1992 there is really little of substance going to Mr. D'Eri's allegations of non-representation by the union. They include three events that took place in January 1992 which are culminating incidents relating to the discharge. All of these will be before the arbitrator. Two of the December 1991 incidents were really disputes about pay entitlement, they were not disciplinary in nature. The only other matter raised took place on December 10, 1991. This related to a letter of reprimand for using a CPC vehicle for uses other than the mobile route which the union says it has no record of. Whether this is true or not, these are all matters that clearly ought to have been fresh in Mr. D'Eri's mind and they could have been included when he filed his complaint in February 1992. At least, not that it would have made any difference to the time limits, he also could have added them in May 1992 when he submitted the other additional particulars. He did not even do so then.

For these matters to be treated as separate timely complaints they should have been filed by the latest some time in March or April 1992 depending on whether one is referring to the December or January incidents.

For them to be treated as hindsight additions to, or as an amendment to the February 10, 1992 complaint, that complaint first had to be lawfully before the Board. As indicated earlier, it was not. The August 11, 1992 particulars therefore cannot be accepted by the Board.

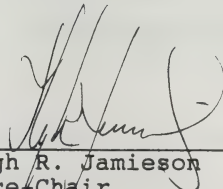
We should also mention that we totally reject Mr. D'Eri's submission that he was not fully aware until some time in December 1991, that the employer was bent on getting rid of him and that the union's alleged failure to act on his behalf throughout 1991 would be a factor should he be dismissed a second time. Although a lay person, Mr. D'Eri is well aware of his rights and what is required to enforce them. He is an ex-Local President of the Letter Carriers' Union of Canada which was displaced by CUPW and he is more than familiar with the grievance-arbitration arena. He is also not a stranger to this Board; he has filed at least one duty of fair representation complaint against CUPW prior to this one.

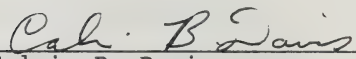
In short, we are satisfied that Mr. D'Eri knew or ought to have known of the circumstances giving rise to his February 10, 1992 complaint at the very latest on October 11, 1991 when he was told unequivocally that CUPW was not proceeding with his grievance related to the five day suspension. His complaint was therefore untimely in light of the ninety-day time limit in section 97(2) of the Code. Having so found,

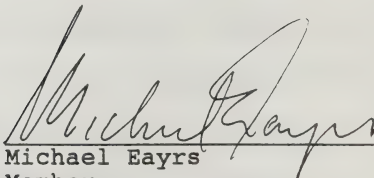
there was nothing lawfully before the Board that could be amended or added to in August 1992.

For all of the foregoing reasons, Mr. D'Eri's complaint is dismissed.

The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair

Calvin B. Davis
Member

Michael Eayrs
Member

DATED at Ottawa this 30th day of October 1992.

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Summary

Résumé de décision

André Moreau, complainant, Brotherhood of Locomotive Engineers, respondent, and VIA Rail Inc., employer.

André Moreau, plaignant, Fraternité internationale des ingénieurs de locomotives, intimé, et VIA Rail Inc., employeur.

Board File: 745-4215

Dossier du Conseil: 745-4215

Decision no.: 970

N° de décision: 970

The Board received a complaint, alleging violation of section 37 of the Canada Labour Code (Part I - Industrial Relations) by the Brotherhood of Locomotive Engineers.

Le Conseil est saisi d'une plainte contre la Fraternité internationale des ingénieurs de locomotives, alléguant violation de l'article 37 du Code canadien du travail (Partie I - Relations de travail).

The complainant claimed that his union had acted in a discriminatory fashion when it refused to proceed with his grievance concerning the appointment of a Canadian National employee to a locomotive engineer position at VIA Rail.

Le plaignant prétend que son syndicat a agi de façon discriminatoire en refusant de donner suite à son grief contestant la nomination d'un employé de Canadien National à un poste d'ingénieur de locomotives à VIA Rail.

The complainant submitted that the Brotherhood had not properly interpreted and applied the terms of the collective agreement and the special agreement.

Le plaignant prétend que la Fraternité a mal interprété et appliqué les modalités de la convention collective et de l'accord spécial.

The Board reiterated that it usually regards with respect the opinion of the authors of a collective agreement, that is, the union and the employer.

Le Conseil rappelle qu'habituellement il respecte l'opinion des auteurs d'une convention collective, notamment le syndicat et l'employeur.

The Board concluded that the Brotherhood had not treated the complainant in a discriminatory fashion.

Le Conseil conclut que le syndicat n'a pas agi de manière discriminatoire envers le plaignant.



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MAINTENANT ACCESSIBLES DANS QUICKLAW.

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Reasons for decision

André Moreau,

complainant,

and

International Brotherhood of
Locomotive Engineers,

respondent,

and

VIA Rail Canada Inc.,

employer.

Board File: 745-4215

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Messrs. J. Jacques Alary and François Bastien, Members.

Appearances

Mr. André Moreau, on his own behalf;

Mr. Gilles Hallé, for the International Brotherhood of Locomotive Engineers.

These reasons for decision were written by Mr. J. Jacques Alary, Member.

I

On April 15, 1992, the Board received a complaint filed by André Moreau (the complainant) against the International Brotherhood of Locomotive Engineers (the union or BLE) alleging violation of section 37 of the Canada Labour Code (Part I - Industrial Relations). This section reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The complainant claimed that his union acted in a discriminatory manner in refusing to pursue his grievance of January 23, 1992 contesting the appointment of Jacques Roberge to the position of locomotive engineer at VIA Rail Canada Inc. (VIA Rail), following the posting of bulletin no. 800-2-E.

The Board held a public hearing into this matter on October 13, 1992 in Québec. VIA Rail, the employer, indicated before the hearing that it would not participate.

The Facts

D.R. Cloutier worked for VIA Rail as a locomotive engineer in the Québec district. Mr. Cloutier had to leave his job because of illness in April 1991 and never returned to it. He died in November 1991. At VIA Rail, each spring and fall locomotive engineer assignments are posted and all engineers, in order of seniority, choose their assignment for the next six months. Mr. Cloutier, one of the most senior locomotive engineers in that district, as was the complainant, asked in the spring of 1991 that he be given the same assignment he held prior to his sick leave a few weeks earlier. During his absence, an engineer on the replacement crew carried out this assignment until the fall of 1991. At that point, when the assignment changes were posted, Mr. Cloutier, who was very ill, did not request an assignment. Mr. Moreau, for his part, requested Mr. Cloutier's previous assignment and, because of his seniority, obtained it.

Following the death of Mr. Cloutier, VIA Rail posted the vacant engineer position in bulletin no. 800-2-E of December 31, 1991. This position was also posted at Canadian National. Jacques Roberge, then a Canadian

National employee, applied for and obtained this position on January 7, 1992. It should be noted that the bulletin advertising the engineer position did not refer to the assignment, except to specify that it involved Mr. Cloutier's replacement. Upon his arrival at VIA Rail, Mr. Roberge, because of his seniority, displaced Mr. Moreau who in turn displaced a less senior engineer. Following this, Mr. Moreau filed a grievance on January 23, 1992 contesting the awarding of this assignment to Mr. Roberge.

The BLE informed Mr. Moreau that it would not pursue his grievance because the union and the employer had agreed to apply article 4(b) of the special agreement reached by VIA Rail, Canadian National and the BLE. The agreement, signed in 1987, was part of the transfers to VIA Rail, beginning in 1977, of activities related to Canadian National's passenger service. In accordance with that agreement, vacant permanent locomotive engineer positions at VIA Rail would be posted at Canadian National and at VIA Rail under the provisions of collective agreement no. 1.1 and more specifically the articles applying to the Québec district. After receiving this reply, Mr. Moreau filed the instant complaint.

The Positions of the Parties

The BLE claimed that it had not acted in a discriminatory manner in representing the complainant because a locomotive engineer position became vacant when Mr. Cloutier died. The BLE, VIA Rail and Canadian National all said that the procedure to be followed in filling this position was the procedure set down in the special agreement reached by the parties. Following this posting, Jacques Roberge applied for and obtained the position. Because of his seniority, he displaced Mr. Moreau. Nothing in the union's actions could lead the Board to conclude that it breached its duty of fair

representation under section 37 of the Code. Moreover, the union was not going to ask Mr. Cloutier, in his state of health, to apply for this assignment.

Mr. Moreau, for his part, argued that the BLE incorrectly interpreted and applied the provisions of the collective agreement and the special agreement. He added that the fact that Mr. Cloutier did not make a request when the assignments were posted in the fall of 1991 should have led the BLE to conclude that there was no locomotive engineer position vacant at VIA Rail following Mr. Cloutier's death, but merely an assignment that had to be filled every six months according to the seniority of the engineers already employed at VIA Rail.

The Decision

The Board must decide whether the BLE, in refusing to refer to arbitration Mr. Moreau's grievance contesting the method used to fill the position left vacant by Mr. Cloutier, acted in an arbitrary or discriminatory manner or in bad faith in representing the complainant.

When the Board convened the public hearing, it informed the parties that this hearing would deal with the circumstances and factors that entered into the union's decision to apply the special agreement to deal with the situation created by Mr. Cloutier's death rather than use other forms of staffing. At the hearing, Mr. Hallé, representing the BLE, explained the procedure he had followed in this case. He explained the initiatives that he took with the two employers involved and the manner in which he interpreted and applied the special agreement reached by the parties. He also explained why, in the union's opinion, Mr. Cloutier's departure created a vacancy and not an

assignment and why Mr. Moreau was mistaken about what had taken place when the engineer position was filled.

In Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043, the Supreme Court of Canada summarized in five points the duty of fair representation:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

3. *This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(pages 527; 654; and 12,188)

That decision established that the union has considerable discretion when deciding whether to refer a grievance to arbitration. In André Cloutier (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319), the Board specified the factors and criteria it takes into account in determining whether a union has breached its duty of fair representation. See also John Valiante (1982), 51 di 112 (CLRB no. 395), at page 114; Gordon Newell (1987), 69 di 119 (CLRB no. 623), at pages 122-123; Martin Poiré et al.

(1987), 72 di 135 (CLRB no. 666), at pages 140-142; Gail McDonough (1989), 78 di 28 (CLRB no. 745), at pages 36 and 38; and Jacqueline Brideau (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550), at pages 225-226; 255; and 14,101.

In Robert Wootton et al. (1985), 61 di 30 (CLRB no. 513), the Board said the following:

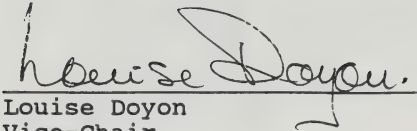
"Often at stake is the meaning and/or effect of the collective agreement - both of which appear to be ingredients in this complaint. Normally, full deference must be accorded to the views of the authors of the collective agreement - the union and the employer - as to its meaning and effect (absent a ruling by an arbitrator), although, of course, a patently unreasonable interpretation and application that impacted unfairly or discriminatorily on a complainant might well bring the union into conflict with section 136.1."

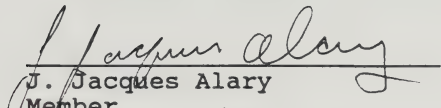
(page 35)

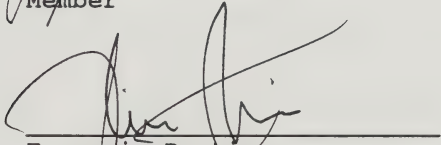
The Board, after analysing all the information on file and the submissions made by the parties at the hearing, concluded that the union had not acted in a discriminatory manner in representing Mr. Moreau. Moreover, the reason given by the union for not pressing Mr. Cloutier, who was very ill at the time, to apply for an assignment in the fall of 1991 was, in the circumstances, very understandable.

Mr. Moreau may not agree with the union's action and the manner in which it interpreted the collective agreement and the special agreement, but nothing in the evidence indicates that the union acted in a discriminatory manner in representing Mr. Moreau.

Accordingly, the Board dismissed the complaint. This is a unanimous decision.


Louise Doyon
Vice-Chair


J. Jacques Alary
Member


François Bastien
Member

ISSUED at Ottawa, this 5th day of November 1992.

CCRT/CLRB - 970

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Summary

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
COMPLAINANT UNION, AND GENERAL
AVIATION BUSINESS ENTERPRISES INC.
(G.A.B.E. INC.), RESPONDENT
EMPLOYER.

Board File : 745-4217

Decision No.: 971

The Board concluded that a person who was the principal proponent of the unionization of employees of the Shell Canada refuelling dealer at Ottawa International Airport (General Aviation Business Enterprises Inc.) was fired, in part at least, for his involvement with the International Association of Machinists and Aerospace Workers, and that this was in violation of section 94(3)(a)(i) of the Canada Labour Code (Part I - Industrial Relations).

The Board ordered the person reinstated and compensated for lost wages.

Résumé de Décision

L'ASSOCIATION INTERNATIONALE DES MACHINISTES ET DES TRAVAILLEURS DE L'AÉROSPATIALE, PLAIGNANTE, ET GENERAL AVIATION BUSINESS ENTERPRISES INC. (G.A.B.E. INC.), EMPLOYEUR INTIMÉ.

Dossier du Conseil: 745-4217

Décision n°: 971

Le Conseil en est arrivé à la conclusion que l'un des principaux partisans de la syndicalisation des employés du détaillant de Shell Canada chargés du ravitaillement en essence à l'aéroport international d'Ottawa (General Aviation Business Enterprises Inc.) a été congédié en raison, du moins en partie, de son affiliation à l'Association internationale des machinistes et des travailleurs de l'aérospatiale et que ce congédiement constitue une violation du sous-alinéa 94(3)a)(i) du Code canadien du travail (Partie I - Relations du travail).

Le Conseil a ordonné que l'employé soit réintégré et qu'il soit indemnisé pour la perte de rémunération qu'il a subie.



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**LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.**

Reasons for decision

International Association of
Machinists and Aerospace
Workers,

complainant union,

and

General Aviation Business
Enterprises Inc.
(G.A.B.E. Inc.)

respondent employer.

Board File: 745-4217

The Board was composed of Vice-Chairman Thomas M. Eberlee and Members Calvin B. Davis and Mary Rozenberg.

Appearances

James L. Shields, for the International Association of Machinists and Aerospace Workers; and
Graham Clarke, for General Aviation Business Enterprises Inc.

These reasons for decision were written by Vice-Chairman Eberlee.

I

The International Association of Machinists and Aerospace Workers (IAM) filed a complaint with the Board on April 16, 1992 alleging that General Aviation Business Enterprises Inc. (G.A.B.E. Inc.) had violated sections 94(3)(a)(i) and (e) of the Canada Labour Code (Part I - Industrial Relations) in dismissing an employee, Michael Welch, because he proposed to become a member of the IAM and sought to have the IAM organize the employees of G.A.B.E. Inc. at Ottawa airport. Sections 94(3)(a)(i) and (e) read

as follows:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

...

94.(3) No employer or person acting on behalf of an employer shall

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;"

A hearing was held in Ottawa on September 16 and 17, 1992.

II

General Aviation Business Enterprises Inc. is the Shell Canada aircraft refuelling dealership at Ottawa International Airport. The company's principals are Guy Ranger, its president, and Peter Meads, its vice-president, both of whom previously operated Shell refuelling dealerships at airports in Northern Ontario.

Until November 1991, Shell Canada provided refuelling services directly to airline customers at Ottawa airport. On November 1, G.A.B.E. Inc. took over Shell's business as dealers for Shell vis-à-vis the same customers. On August 1, 1992, G.A.B.E. Inc. began a second service for non-airline or corporate aircraft at a new "aerocentre" constructed especially for the purpose.

When Shell operated the airline refuelling service directly, its employees were paid approximately \$19.00 per hour. G.A.B.E. Inc. went into business paying about \$14.50 per hour.

During September and October 1991, Messrs. Meads and Ranger met the Shell employees, told them what was about to happen in respect of G.A.B.E. Inc. becoming the Shell dealer and replacing Shell as the employer of the refuelling staff and outlined the terms and conditions that would be available to those who became G.A.B.E. Inc. employees. Those Shell employees who signified an interest in working for G.A.B.E. Inc. were interviewed.

The Board was told that Shell offered a severance benefit package to its employees: the package was higher for persons who were not hired by G.A.B.E. Inc. and lower for those who were.

III

Michael Welch was an aircraft refueller who had been employed by Shell Canada Products for some time. He was interviewed by vice-president Meads and was hired effective November 1, 1991.

According to G.A.B.E. Inc.'s principals, Messrs. Meads and Ranger, Mr. Welch was dismissed as a result of a series of incidents which commenced as soon as he was hired, if not long before he was taken on by G.A.B.E. Inc. The following rationale for the firing appeared in the letter of dismissal signed by them and dated January 19, 1992:

"You have made it clear to us in your comments, actions and work performance that you are very unhappy working for G.A.B.E. Inc. and accepting our management style and procedures, that we feel are imperative for the continued smooth and effective operation of our business. During your job interview for employment with G.A.B.E. Inc. you were told that your attitude was unacceptable and would have to change very positively in order that we both enjoy a good employer/employee relationship. You said that you understood and agreed to comply. Unfortunately that has not happened."

During the course of the hearing, the Board learned what, if anything, this indictment of Mr. Welch actually meant.

Not surprisingly, Mr. Welch was unhappy when Shell apparently decided either to make its products more competitive at the airport or its profit margins greater, or both, by way of a dealership scheme which would enable wage costs to be sharply reduced. He let his unhappiness be known even before G.A.B.E. Inc. took over the business.

Mr. Meads testified that at a meeting he and Mr. Ranger had with Shell's employees in September or October 1991, Mr. Welch was present. Mr. Welch spoke rudely in reference to the proposed wage cut of \$4.50 per hour. According to Mr. Meads, this was "a taste of the way he approaches his prospective boss." Thereafter, he "very, very often ... continuously" ... felt Mr. Welch's behaviour was "inappropriate"... "snotty."

Mr. Welch applied to G.A.B.E. Inc. for employment. He also applied to Shell for the higher severance package.

The principals of G.A.B.E. Inc. were unable to explain to the Board why Shell, in laying off its employees, offered those who subsequently sought and obtained employment with any employer other than G.A.B.E. Inc. - or who could not find work at all - a higher severance package than those who applied for and won a job with the new Shell dealership at a much lower wage. Mr. Welch could not understand the rationale for this, either, because "it wasn't Shell's business who I was going to work for on November 1." This was why he tried to obtain the higher severance payment.

The principals of G.A.B.E. Inc. did not or perhaps could not enlighten the Board as to why the act of applying for the higher severance package was to be regarded as some kind of infraction which would deserve to figure in the tally of Mr. Welch's crimes leading up to his dismissal, nor did they explain why it was their job to police Shell's severance program.

In any event, Mr. Meads learned that Mr. Welch had simultaneously applied for work with G.A.B.E. Inc. and for the higher severance package from Shell. Mr. Meads told the Board he felt "fooled" and in an uncomfortable position. He spoke to Mr. Welch and said to him he could not be considered for a job if he was opting for the higher package. Mr. Welch's response was to start to apologize. "He started to break down, I guess realizing that he was without a job ...," Mr. Meads testified.

Mr. Welch asked G.A.B.E. Inc. to reconsider. Mr. Meads

said they would only do so if Mr. Welch called somebody at Shell in the presence of the two G.A.B.E. Inc. principals and opted for the lower package. Mr. Welch complied and was hired, although during the course of one interview Mr. Welch was "sour" and both Mr. Meads and Mr. Ranger warned him against having a "poor attitude."

This matter of the severance package and the pre-hiring "rudeness" concerning the reduced wage rate got the Welch - G.A.B.E. Inc. relationship off to a bad start, from which it never recovered, according to Mr. Meads. He told the Board that Mr. Welch was "extremely negative", often insolent to management, confrontational and disrespectful. He testified that in the end he told Mr. Welch he was being fired for his "very negative attitude."

The following reasons were cited to the Board as the basis, further to the pre-November 1 rudeness and the severance pay matter, for G.A.B.E. Inc.'s decision to fire Mr. Welch.

Early in November, Mr. Ranger noticed Mr. Welch making an obscene gesture. The latter assured Mr. Ranger the gesture was not meant for him, but it continued to rankle Mr. Ranger sufficiently to warrant mention in his testimony.

In December, Mr. Welch irritated Mr. Meads by asking, "What's the hiding place for the cheques?" It was explained to the Board by Mr. Welch that often, on pay day, the employees had to "chase" their cheques because they were not always left in the same place.

On December 26, 1991, Mr. Welch was a member of the skeleton staff that refuelled planes during the holiday.

The company arranged for one of the airline catering firms to provide and deliver a hot filet dinner for the staff. The next day, Mr. Meads asked Mr. Welch if the dinner had been delivered and how was it. Mr. Welch replied, "It was airline food; what can I say?" Mr. Meads told the Board he took this as a "personal shot."

Employees received a \$500 Christmas bonus. Mr. Meads testified that Mr. Welch thanked him but not Mr. Ranger. The latter testified that he asked Mr. Welch if he had received his money and Mr. Welch replied: "Yes, and it's about time you guys started doing something for us."

Early in January, Mr. Welch, while in the process of refuelling a plane on the ramp at the terminal building, called through to the G.A.B.E. Inc. office on the radio system and asked for immediate help. He did not say what was wrong. Two employees, plus Messrs. Meads and Ranger, were present and heard the call. Mr. Welch didn't ask for anyone in particular to help him, but Messrs. Meads and Ranger responded at once; all conceded in testimony that Mr. Welch did not necessarily expect them to be the ones who would respond.

When they arrived, Mr. Welch said: "It's about time you got here." It turned out that he did need help because the rewind mechanism on the hose he had had to use to fill the plane's fuel tanks would not work. Moreover, this plane had taken more fuel than he had expected and therefore the operation had taken longer than he had planned. He had another flight to refuel immediately. With the rewind mechanism not working, he was afraid that this flight would be delayed in departing and that he could

also cause a hold-up in the next flight and that he would get into trouble through no fault of his own. Messrs. Meads and Ranger helped him by hand-cranking the hose back on the reel. Mr. Meads conceded in testimony that Mr. Welch had had a real concern but he expressed displeasure that Mr. Welch had been "harsh" and "very wound up." No words of reprimand were spoken to Mr. Welch at the time, except that, according to Mr. Meads, his partner, Mr. Ranger said something to the effect that Mr. Welch was "giving his boss shit."

Matters came to a head at a staff meeting attended by Mr. Welch and three or four other employees with Messrs. Meads and Ranger in mid-January. It seems that Mr. Welch asked some questions and made some statements that put him decidedly on the wrong side of his bosses.

Some time earlier, it had been Mr. Welch's responsibility, on a particular day, to record certain important readings on gauges having to do with the fuel supply system. He had discovered when he checked the gauges and the book in which the readings were to be recorded that certain numbers had already been written down for some gauge readings and that one or more were inaccurate.

At the January staff meeting, Mr. Welch asked how long "the defrauding of the books" was going to continue. The Board is satisfied from the evidence of all three witnesses at the hearing - Mr. Meads, Mr. Ranger and Mr. Welch - that at the time he raised this matter, Mr. Welch was not aware who had written down the fictitious gauge reading or readings, although in his evidence in chief, Mr. Meads at first said that Mr. Welch accused him "in a nasty, sharp, insinuating

tone" of having done so. Shortly thereafter at the Board's hearing, truth won out and Mr. Meads conceded in cross-examination that Mr. Welch could not have known at that point who had written down the false figures. Hence, Mr. Welch did not accuse him, as he at first stated.

After Mr. Welch raised the subject of the false figures - not very diplomatically it must be stated - (he probably would have been a great deal more diplomatic if he had realized the perpetrator was the boss) Mr. Meads confessed to the meeting that he was responsible for the fictitious readings.

Mr. Welch told the Board that he raised the matter of the false readings because he and fellow employees had been made very aware in the past by Shell Canada that the readings recorded in its "check record manual" were important and had to be accurate. He was surprised when Mr. Meads admitted that he had not looked at the gauges and had simply made up the readings. Mr. Meads conceded in cross-examination that Shell requires accurate checks to be made and recorded and that if an employee had done what he did he would have been "spoken to."

Mr. Welch stirred up a second hornet's nest at the January staff meeting - and this time not so innocently. He asked if there were two sets of rules at G.A.B.E. Inc. - one for management and one for the refuellers. Mr. Ranger asked him what he was talking about. He replied that he was referring to a fuel spill for which Mr. Ranger had been responsible and which had not been reported to the Environment Ministry as required by law.

Mr. Ranger explained to the Board that he and a trainee refueller had taken a refuelling truck to the ramp in front of the Ministry of Transport facility. He noticed that fuel was leaking from a tap. He shut the tap off, radioed Mr. Meads and asked him to bring the "spill vehicle." Meanwhile Ministry of Transport employees told him not to do anything about it, that they would clean up the mess. So, Mr. Ranger radioed Mr. Meads again and told him not to come, after all. Mr. Ranger testified that he asked somebody from MOT who was in charge, but whose name he could not remember, whether they wanted him to report the spill to Environment and the MOT person said not to bother, that MOT would do it.

After Mr. Ranger explained this at the staff meeting, Mr. Welch repeated that there were two sets of rules. Mr. Ranger told the Board he then realized that he was not accountable to Mr. Welch, that it was actually the other way around: Mr. Welch was accountable to him. So he declined to discuss the question further and the meeting broke up almost immediately.

Mr. Ranger testified that Environment requires all fuel spills to be contained and cleaned up. It also requires all spills to be reported verbally and later in writing to ministry officials. He told the Board he follows this procedure, except in the case of the spill raised at the staff meeting by Mr. Welch. In this instance, he took it for granted that the MOT person would report the incident. When and after Mr. Welch brought it up in January he did nothing to check out whether in fact a report had been made to the Environment Ministry, as the person responsible for a spill is required by law to do; now he is concerned that

he did nothing. He told the Board that if an employee did not report such an incident, he would be reprimanded.

Mr. Welch testified that he was in his refuelling truck when he heard Mr. Ranger say over the radio that a fuel spill had occurred. He drove to the MOT location to see if there was anything he could do to help. He saw others handling the situation so he proceeded to the place where he was to refuel an aircraft. He heard Mr. Ranger say over the radio that this spill should go unreported. He raised the matter at the staff meeting because Shell had instructed them on the proper procedures; G.A.B.E. Inc. had done no training on the point. He considered what Mr. Ranger had done to be "demoralizing" because it was contrary to Environment regulations.

After the staff meeting, Messrs. Meads and Ranger talked about Mr. Welch and decided that his "attitude was going the wrong way." Mr. Welch had three or four regular days off and when he returned to work on January 19, 1992, the partners fired him.

IV

Mr. Welch testified that when employees learned Shell Canada was contemplating the contracting out of its refuelling service at Ottawa International Airport, they began discussing the pros and cons of unionization. He and another employee (a Mr. Watier) took the lead in exploring the question on behalf of their fellow employees.

He contacted the Teamsters Union and the Canadian Auto Workers and finally the IAM, which was already known to him

because it represented other units of employees at the airport. Discussions concerning the IAM continued among the employees during November, December and January. The plan was to establish a consensus among the employees in favour of the IAM and then to formalize this with the signing of union cards. A union representative was not actually sent to the site by the IAM until January 21, 1992, two days after Mr. Welch's dismissal, and cards were signed by employees around January 29. The union was subsequently certified by the Board as the bargaining agent.

In the absence of any evidence to the contrary, the Board accepts Mr. Welch's account of what went on in respect of the organization of the union and of his part in it.

Mr. Ranger told the Board that he was aware in September, before he and Mr. Meads assumed the dealership, that employees were talking about unionization. In cross-examination, while he did not deny that he was aware of such talk after November 1, he said that he could not recall it.

He did remember one occasion in September 1991 when an employee asked him what he thought about unions. He told the Board that he replied this was a matter for employees to decide.

Mr. Welch testified that during an encounter in November with Mr. Ranger, at which his colleague, Mr. Watier, was present, Mr. Ranger told them a union was not necessary at G.A.B.E. Inc. Asked in cross-examination whether such an encounter and such a discussion had occurred, Mr. Ranger

told the Board that he could not recall - which is not the same as saying that they did not happen.

Mr. Welch testified that his colleague, Mr. Watier, did not play any role in trying to organize a union after this particular event. At the staff meeting in mid-January, the partners of G.A.B.E. Inc. announced Mr. Watier's promotion to the position of supervisor.

The Board considers that the evidence given by Mr. Welch is probably correct; that Mr. Ranger knew that union organizing activity was going on and that Mr. Welch was a principal in that activity. It is not difficult to infer, particularly in the absence of any evidence to the contrary, that Mr. Watier, who obviously had the confidence of management, was a source of information to Mr. Ranger and his associate. Moreover, it seems clear to the Board that Mr. Ranger did not like what was going on.

V

The Board concludes that the long list of incidents already cited by G.A.B.E. Inc. as constituting the rationale for Mr. Welch's dismissal - and the list is not particularly convincing in itself - does not constitute the sole basis for his involuntary departure. The Board considers that the partners' view that Mr. Welch had a "bad attitude" was also based upon their knowledge of his union activity and upon their determination to be separated from that activity.

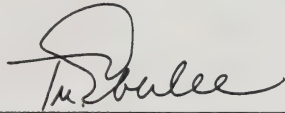
It is well-settled in law that if there is any element of "anti-union animus" in an employee's dismissal - that is to say, if any part of an employer's reason for a firing relates to an employee's union involvement - the dismissal may be deemed by the Board to be in violation of section 94(3)(a)(i). In this instance, the evidence forces the Board to the conclusion that, however much Messrs. Ranger and Meads came to dislike Mr. Welch because of their apparent differences with him, one of their unacknowledged reasons for firing him was because he was engaging in union activity. Thus, they violated section 94(3)(a)(i).

VI

Section 99 of the Code gives the Board certain powers to prescribe remedies for a contravention of section 94. Under the authority of section 99, the Board orders G.A.B.E. Inc. to:

1. reinstate Mr. Welch in the employment he had with the company prior to January 19, 1992 within 10 days of the date of these reasons; and
2. compensate him within 30 days of the date of these reasons in an amount of money equal to that which he would have earned had he continued in employment between the date of his dismissal and the date of reinstatement.

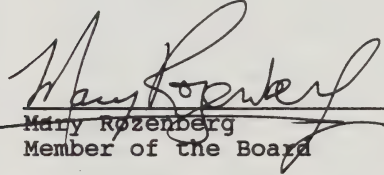
The Board appoints Gérard Legault, Director General (Operations) and Chief Registrar, or a person designated by him, to assist the parties to implement the foregoing orders. The Board shall remain seized of this matter in order to resolve any questions which may arise and to make a formal order, should such be required.



Thomas M. Eberlee
Vice-Chair



Calvin B. Davis
Member of the Board



Mary Rozenberg
Member of the Board

ISSUED at Ottawa, this 10th day of November 1992.

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Summary

DAN REID ET AL., COMPLAINANTS, UNITED
TRANSPORTATION UNION, RESPONDENT, AND
CANADIAN NATIONAL RAILWAY COMPANY,
EMPLOYER.

Board File: 745-4207

Decision No.: 972

Résumé de Décision

DAN REID ET AUTRES, PLAIGNANTS,
TRAVAILLEURS UNIS DES TRANSPORTS,
SYNDICAT INTIMÉ, ET COMPAGNIE DES
CHEMINS DE FER NATIONAUX DU CANADA,
EMPLOYEUR.

Dossier du Conseil: 745-4207

Décision n°: 972

This is a complaint under the duty of
fair representation provisions of the
Canada Labour Code (Part I -
Industrial Relations). The subject
of the complaint is the negotiations
of what has become known in the
railway industry as the "Conductor
Only Agreements" which, amongst other
things, provides for guaranteed
incomes for union members in return
for the reduction in crew sizes from
three persons to two. It was the
difference in these guarantees
between road and yard service that
sparked the complaint. Apparently,
less senior employees who habitually
work the road gain more from the
guarantees than more senior employees
who, more often than not, bid for the
more stable yard work.

The Board disposed of the complaint
without a public hearing under its
authority in section 98(2) of the
Code. In its reasons, the Board
briefly revisits its policies and
practices regarding the duty of fair
representation as it affects
collective bargaining as opposed to
contract administration. In this
regard, the Board reaffirms the need
for a wide degree of latitude for
trade unions in these situations.
The Board also deals briefly with its
jurisdiction over mid-term
negotiations such as these. The
complaint was dismissed as being
without merit.

Il s'agit d'une plainte portant sur
le devoir de représentation juste
prévu à l'article 37 du Code canadien
du travail (Partie I - Relations du
travail). Dans la plainte il est
question de négociation, dans le
secteur ferroviaire, d'ententes
spéciales régissant les chefs de
train. Ces ententes prévoient, entre
autres choses, un revenu garanti aux
membres du syndicat qui, en retour,
acceptent que la taille des équipes
de travail soit réduite de trois à
deux personnes. Ce sont les
différents revenus garantis aux
employés du service de ligne et à
ceux du service de manoeuvre qui ont
donné lieu à la plainte. Des
employés ayant moins d'années
d'ancienneté affectés habituellement
au service de ligne obtiennent
apparemment plus que des employés
ayant plus d'années d'ancienneté qui
effectuent très souvent du travail
stable au service de manoeuvre.

Le Conseil a tranché la plainte sans
tenir d'audience publique en
conformité avec le paragraphe 98(2)
du Code. Dans ses motifs, le Conseil
passe brièvement en revue ses
politiques et pratiques relativement
au devoir de représentation juste, et
surtout la façon dont ce devoir
influe sur la négociation collective
par opposition à l'application du
contrat. À cet égard, le Conseil
déclare de nouveau que les syndicats
doivent avoir une grande latitude
dans ce genre de situation. De plus,
il traite brièvement de sa compétence
en matière de négociations pendant la
durée du contrat. Il rejette la
plainte parce qu'elle n'est pas
fondée.

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**LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.**

Canada
labour
relations
board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Dan Reid et al.,
complainants,
United Transportation Union,
respondent,
and
Canadian National Railway
Company,
employer.

Board File: 745-4207

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Mr. Joe Coutts, for the complainants;
Mr. Michael A. Church, for the respondent; and
Mr. Duncan M. MacPhail, for the employer.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with a complaint under the duty of fair representation provisions in section 37 of the Canada Labour Code (Part I - Industrial Relations). The complaint was filed on April 6, 1992 in the name of Mr. Dan Reid who is but one of seventeen members of the United Transportation Union (the UTU or the union) who launched this action, therefore, we shall refer to the complainants as Dan Reid et al. The other party

affected by the complaint is the Canadian National Railway Company which shall be referred to as CN Rail or the employer.

The circumstances giving rise to this complaint are not really in dispute. They surround a rather complex set of negotiations between CN Rail and the UTU which resulted in the parties entering into agreements that have become known as the Conductor Only Agreements. The process started in the spring of 1991 when CN Rail and the union commenced bargaining for a Conductor Only Agreement that would affect the portion of the employer's operations extending east from Thunder Bay to Montreal. This agreement was apparently signed on July 12, 1991. The same process was repeated for CN Rail's operations extending from Thunder Bay to Vancouver with a Conductor Only Agreement being reached early in 1992. This agreement, which is the subject of this complaint was ratified by the union membership in March 1992.

For our purposes, we need not go into too much detail about the specific contents of the agreement; suffice it to say that it basically provides for the reduction in crew size from three persons to two. In return for this reduction in crew size, certain protections were built into the agreement for employees in the UTU bargaining unit hired before June 29, 1990. These protections related to no layoffs, wage guarantees and early retirement and severance benefits. Particularly relevant to this complaint are the wage guarantees which differed for those on road service and those on yard service.

Under the provisions of Article 113 of collective agreement no. 4.3 which governs trainmen and yardmen employed in CN Rail's Prairie and Mountain Regions (which extend from Thunder Bay to Vancouver) employees have the right to bid for either road service or yard service. This bidding takes place in the spring and fall of each year, usually on the last Sunday in April and October. This is commonly known as the spring or fall "Change of Card". Apparently, road service yields higher earnings but involves being on call and away from home. Yard service, on the other hand, means regular assignments, regular shifts and work within one terminal. Employees with more seniority often prefer and bid for the more stable yard service.

These historical differences in earnings between yard and road service are reflected in the wage guarantees in the relevant Conductor Only Agreement which provides for a minimum of 4000 miles and up to a maximum of 4300 miles per month for those on road service and, a set guarantee of \$3,034 per month for those on yard service. These guarantees became effective at the time of implementation of the agreement which was in this case, April 10, 1992. The guarantees apparently apply to individuals and they are locked in depending on which schedule the employee was on, i.e., road or yard, at the date of implementation. They cannot be improved by an employee changing from yard to road service at the next change of card. According to Dan Reid et al., the miles guaranteed to road service employees could amount to anywhere between \$3,850 to \$4,150 per month which is of course greater than the set rate guarantee for yard employees.

Dan Reid et al. are senior employees with seniority dates varying from 1960 to 1975. They had bid for (in October 1991) and were working in yard service at the time of implementation of the agreement on April 10, 1992. They, therefore, drew the lower wage guarantee. They now complain that the Conductor Only Agreement that affects them is arbitrary and discriminatory because it grants higher wage guarantees to junior employees who happened to be on road service when the agreement was implemented. They further submit that their seniority rights have been abrogated unnecessarily and that an agreement could have been reached that treated everyone equally. They also claim that they were unaware in October 1991, when they bid for yard service, that the union and the employer were about to negotiate the Conductor Only Agreement that affected their employment.

As a remedy, Dan Reid et al. sought an order from the Board declaring that the aforesaid Conductor Only Agreement is null and void. Initially, they requested an interim order to delay the implementation of the Conductor Only Agreement until the merit of the complaint had been dealt with, however, this request was denied by the Board.

On September 4, 1992, the parties were notified that this quorum of the Board had exercised its authority under section 98(2) of the Code to dispose of the complaint without the need for a public hearing. They were also notified that the Board had dismissed the complaint as being without merit. These are the Board's reasons for so finding.

II

Section 37 of the Code provides:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

None of the parties to this complaint have taken issue with the Board's jurisdiction to deal with this complaint, notwithstanding that it goes to negotiations of a collective agreement rather than to the administration of a collective agreement which has been the normal target for section 37 complaints since the Code was amended on July 18, 1984. It goes without saying that parties cannot give this Board jurisdiction over matters not properly before it, either by agreement or by silent acquiescence, therefore, we shall deal with this issue of jurisdiction, albeit rather speedily.

For these purposes, we need only refer to Peter G. Reynolds et al. (1987), 68 di 116; and 87 CLLC 16,011 (CLRB no. 607) which summarizes most of the Board's writings on this topic following the 1984 amendments which brought in the wording of section 37 as it presently exists. What can be drawn from that case is that Parliament undoubtedly intended, by way of these 1984 amendments, to remove the negotiating process from the Board's jurisdiction under the duty of fair representation provisions in the Code. This was done

to ensure that freely negotiated collective agreements could not be annulled by the Board as a result of a complaint under these provisions of the Code.

Naturally, the Board has accepted this exclusion of negotiations from its jurisdiction. However, after analyzing the construction of the new duty of fair representation provisions of the Code following the amendments, the Board has concluded, on at least two occasions, that mid-term bargaining which affect rights of employees with respect to the collective agreement that is applicable to them can indeed fall within the scope of section 37 of the Code. (See Peter Reynolds et al., supra, and George Harris et al. (1986), 68 di 1; 15 CLRBR (NS) 328; and 86 CLLC 16,059 (CLRBR no. 597)).

Clearly, the negotiations that are the subject of this complaint are of the mid-term nature described in the foregoing cases. It is, therefore, our finding that the Board does have jurisdiction to deal with this complaint.

As for the decision of the Board to deal with this complaint on the basis of the written submissions of the parties without incurring the necessary costs related to a public hearing, this can also be disposed of quite readily. Section 98(2) of the Code provides:

"98.(2) The Board may refuse to hold a public hearing on a complaint made in respect of an alleged contravention of section 37 or non-compliance with section 69 if, in the opinion of the Board, such a hearing would not be consistent with the objectives of this Part."

In this complaint, as we noted earlier, the facts are not in dispute. The cast of players and the sequence of events are clearly set out in the submissions of the parties and they have been expertly capsulized in the Board Officer's report. The positions of the parties and their arguments on the law and its applicability are also well documented. In short, everything that the Board could learn by going to a public hearing was already before it. There were also no crucial credibility gaps which would have required vive-voce evidence to resolve. In these circumstances, the Board saw no point in bringing all of these people together from all parts of the country to a hearing just to repeat what was already before the Board. If ever there was a situation that called for the Board to exercise its discretion under section 98(2) to waive the need for a public hearing, this was surely it.

III

One other matter that needs explaining before we turn to the merit of the complaint is how the Board viewed the request by Dan Reid et al. for interim relief. What they sought was an order from the Board delaying the implementation of the Conductor Only Agreement until the complaint had been dealt with. First, we have serious doubts if the Board has jurisdiction to grant such relief and we know of no circumstance where such an order has been issued in the past. In this regard, we would only note that the Board's remedial powers relating to section 37 complaints are triggered only after the Board has made a finding that there has been a violation.

Having said that, and without answering the question of jurisdiction, this was simply not a situation that warranted interim relief. To start with, what Messrs. Reid et al. were complaining about, i.e., the monetary difference in the guarantees between road and yard service was obviously something that could be corrected after the fact vis-à-vis quantum, if the Board later found that the union had somehow breached its duty of fair representation. To hold up the whole agreement, which would have adversely affected not only the employer's operations, but also many employees who were opting to take advantage of the early retirement benefits under the agreement, was simply not in the cards. Furthermore, this agreement had just been voted upon and ratified by a majority of the union's members who were affected, of whom Dan Reid et al. were but seventeen. Clearly, by what they have submitted to the Board and, being members of the UTU's Vancouver Local 701 that has opposed the way the union was handling this whole topic of reduced crew size all along, it is a fair assumption that Dan Reid et al were among the minority that voted against the agreement. To grant the interim relief as requested in these circumstances, would have been tantamount to providing them with an external avenue to scuttle the agreement, at least for a while, which is something they could not achieve through the union's internal democratic processes. This is not what the duty of fair representation under the Code is all about.

Dealing with the complaint itself, we once again draw on Peter G. Reynolds et al., *supra*, where the Board traced the evolution of the Board's policies and practice regarding the duty of fair representation as it relates to negotiations. A key decision referred

to there is Len Larmour et al. (1980), 41 di 110; and [1980] 3 Can LRBR 407 (CLRB no. 260) where the Board dismissed a similar complaint involving the "run through" agreements which were negotiated by the Brotherhood of Locomotive Engineers and CN Rail in 1980. It was there that the Board, after reviewing cases in other jurisdictions in Canada as well as in the United States, adopted the reasoning that the authority of trade unions as exclusive bargaining agents must be allowed a wider degree of latitude in negotiations than in contract administration. That is still the essence of the Board's policies today. Unless there are clear signs of unlawful motives or of prohibited conduct which includes arbitrariness, discrimination or bad faith, this Board will not interfere in the free collective bargaining process through its supervisory role under section 37 of the Code. The Board will certainly not second-guess bargaining agents about the reasonableness or the correctness of the critical choices they have to make when attaching priority to contract items that are on the bargaining table, nor will the Board tell them what items they should or should not have put there.

A common thread that winds its way through most of the writings on this topic is the universal acceptance that complete satisfaction of everyone who is affected by the negotiations of a collective agreement is virtually an impossibility. Inevitable differences will always arise. No matter what approach a union adopts, the decisions taken will favour some and others will not approve. While these differences may be very real, they do not in themselves form the basis for a complaint under the duty of fair representation provisions of the Code. For there to be a breach of

the Code, there has to be some evidence of unlawful conduct on the union's part.

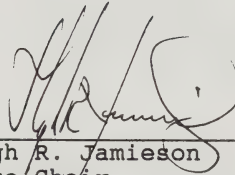
Looking at this complaint in the foregoing context, there is no evidence here that the UTU representatives who negotiated the Conductor Only Agreement in question acted improperly in any way. They undoubtedly acted in good faith at all times and they obviously had the interests of the bargaining unit as a whole at heart. The history of the negotiations as set out in the Board Officer's report, which has not been disputed by the parties, shows a pattern of continuous communications throughout the whole process with the membership at large via Regional and Local Chairpersons and, the members were free to vote for or against the package at the time of ratification. As we already noted, a majority of the members of the UTU did vote for the package which gives them significant job security as well as the income guarantees and early retirement benefits.

In the circumstances, it is difficult to imagine what else the union could have done to protect the interests of its members or how else it could have kept them informed as to what was happening, short of contacting every individual in the bargaining unit. Obviously, whatever it did, it was not going to be enough to satisfy Dan Reid et al. However, as we said, that is the reality of these situations; there is always the inevitable dissatisfied group. But mere dissatisfaction with the result of negotiations is not grounds to support a finding of a violation of section 37 of the Code, nor is a difference of opinion about what is being negotiated. These are all matters that are within the broad discretion enjoyed by the union

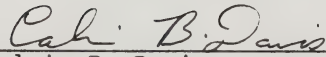
in its role as the exclusive bargaining agent, to which this Board will continue to show deference.

In the absence of evidence to show that the UTU somehow acted arbitrarily, discriminately or in bad faith, the complaint cannot succeed. It is therefore dismissed accordingly.

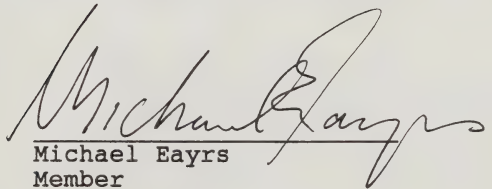
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 12th day of November, 1992.

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Résumé

Syndicat canadien de la Fonction
publique (division du transport
aérien), plaignant, et Nationair
Canada (Nolisair International
Inc.), employeur intimé.

Dossier du Conseil: 745-3830

Décision n°: 973

Les présents motifs de décision
portent sur deux questions qui
n'ont pas été tranchées le 10
juillet 1992 dans Sandra Castro-
Martin et autres (1992), décision
du CCRT n° 943, non encore
rapportée.

Dans un premier temps, le Conseil
a refusé d'instruire deux
plaintes de suspension de deux
agents de bord, en invoquant
l'application du paragraphe 98(3)
du Code. Dans un deuxième temps,
il a rejeté une plainte de
négociation de mauvaise foi
formulée contre l'employeur, la
preuve n'ayant pas démontré que
celui-ci avait, durant la période
visée par la preuve, négocié de
mauvaise foi.

Le Conseil a rejeté une demande
de modification de cette plainte
présentée par le syndicat en
septembre 1992 et qui aurait
entraîné une réouverture
d'enquête. Le Conseil a rendu
cette décision de nature
procédurale dans un contexte
factuel bien précis. Cette
décision ne remet pas en cause
les principes établis quant à la
compétence du Conseil pour
entendre la preuve concernant
tous les faits pertinents qui
sont antérieurs ou postérieurs à
la présentation d'une plainte de
négociation de mauvaise foi.

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Summary

Canadian Union of Public
Employees (Airline Division),
complainant, and Nationair Canada
(Nolisair International Inc.),
respondent employer.

Board File: 745-3830

Decision no.: 973

This decision deals with two
issues that were not settled on
July 10, 1992 in Sandra Castro-
Martin et autres (1992), as yet
unreported CLRB decision no. 943.

First, the Board refused to deal
with two complaints concerning
the suspension of two flight
attendants, by invoking the
application of section 98(3) of
the Code. Second, it dismissed a
complaint of bad faith bargaining
filed against the employer, since
the evidence did not establish
that the latter had bargained in
bad faith during the period
covered in the evidence.

The Board dismissed an
application seeking to amend that
complaint filed by the union in
September 1992 and which could
have re-opened the investigation.
It issued its decision on the
technical aspect, in a particular
context. This decision does not
question the principles
established with respect to the
Board's jurisdiction to hear the
evidence on all relevant facts
whether these precede or follow
the filing of a complaint of bad
faith bargaining.



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Conseil
Canadien des
Relations du
Travail

Reasons for decision

Canadian Union of Public
Employees (Airline Division),

complainant union,

and

Nolisair International Inc.
(Nationair Canada),

respondent employer.

Board File: 745-3830

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Messrs. J. Jacques Alary and François Bastien, Members.

Appearances

Mr. François Côté, for the complainant union; and

Mr. Guy Tremblay, for the respondent employer.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

On January 10, 1991, the Board received an unfair labour practice complaint in which the Canadian Union of Public Employees alleged that the employer had contravened sections 94 and 50 of the Code. Specifically the union challenged the dismissal of 10 flight attendants and the suspension of another for refusing to work a Fort Lauderdale-Mirabel flight on December 10, 1990. The employees had also filed grievances against these measures. The decision on those elements of the complaint was issued on July 10, 1992 in Sandra Castro-Martin et al. (1992), as yet unreported CLRB decision no. 943. In its decision, the Board invoked section 98(3) of the Code and refused to hear and determine the complaints.

Two additional allegations that the employer had violated the Code were not dealt with at the time. The first

allegation pertained to the suspension of two flight attendants, Kimberley Joseph and Eric Lauzon; the other to bad faith bargaining and the altering of rates of pay and other terms or conditions of employment, contrary to section 50 of the Code. The Minister of Labour authorized the Board on May 27, 1991 to consider those questions.

These reasons deal with these two questions in addition to a request made by the union in September 1992 to amend the January 10, 1991 complaint.

I

The Suspensions

Ms. Joseph and Mr. Lauzon were suspended from their duties as flight attendants for two weeks in December 1990. In their opinion, those measures constitute a violation of section 94(3)(a) of the Code. They also challenged the suspensions through grievances under the collective agreement.

With the agreement of the parties, the evidence concerning the suspensions was not heard at the hearings that led to decision no. 943. In its July 10 decision, the Board asked the union to advise of its intention with regard to the complaints. On July 24, the union informed the Board that it was referring the suspension grievances to arbitration. Arbitration hearings in this matter were actually held at the end of August. The union also asked the Board not to rule immediately on the application of section 98(3), as it had done in the other cases dealt with in its July 10 decision.

The union alleged that the arbitrator's jurisdiction had not yet been established and that the complainants' grounds of defence, namely, that they were disciplined because of union activities, were such that the arbitrator might refuse, proprio motu, to consider the grievances on their merits. The employer pointed out that it did not intend to challenge the arbitrator's jurisdiction and that it recognized that the grievance procedure had been observed.

After considering the parties' arguments and the provisions of the applicable collective agreement, particularly as they relate to the arbitrator's jurisdiction, and in the light of the reasons set out in Sandra Castro-Martin et al. regarding the application of section 98(3) to the 11 additional unfair labour practice complaints filed at the same time as the complaints at issue here, the Board refuses to hear and determine, pursuant to section 98(3) of the Code, the complaints of Ms. Joseph and Mr. Lauzon arising from their suspension. The complaints are dismissed.

II

The Request to Amend the January 10, 1991 Complaint

On September 30, 1992, the union filed a request to amend the allegations of bad faith bargaining that are contained in the January 10, 1991 complaint, an issue the Board did not address in its July 10, 1992 decision. The employer objected to this request. The admissibility and validity of the request are matters that warrant a review of the relevant facts.

The hearings in this case extended from May 1991 to the end of February 1992. The Board heard evidence concerning the

complaint of bad faith bargaining and changes in terms or conditions of employment. The evidence focused on the conduct of collective bargaining during the fall and winter of 1990, and the spring of 1991.

Georges Tchoryck, vice-president of human resources at Nationair, and Lawrence Huot, then union president, gave testimony on this process and documentary evidence was filed. The union and the employer had the opportunity to present all the facts and arguments in support of their respective allegations. On February 7, 1992, all evidence had been presented, and the Board began deliberating on the complaint on February 27, 1992, i.e. the final day of hearings in this case.

In its July 10, 1992 decision, the Board indicated that it was staying its deliberations on the complaint of bad faith bargaining, and that it would inform the parties of any further action in this matter. The circumstances that led to the stay of deliberations are as follows.

On April 28, 1992, before decision no. 943 was issued, the Minister of Labour authorized the filing with the Board of two section 50(a) complaints, made respectively by the employer and the union, each alleging that the other was bargaining in bad faith. The Board consolidated these files and held hearings on June 1, 17 and 22, 1992 (Board files 745-4232 and 745-4233).

On June 1, 1992, the parties jointly requested that the Board suspend the hearing of evidence in the two complaints and issue orders directing them to resume bargaining immediately, with the assistance of the special mediator, if they so wished. The Board granted this request and

suspended the hearing until June 17, date on which the parties were to report. The Board notified the parties that in the absence of an agreement by that date, it would begin hearing evidence. On June 12, 1992, the employer informed the Board in writing that it was withdrawing its complaint because bargaining had resumed to its satisfaction following the Board's orders.

The parties appeared before the Board on June 17, 1992, as scheduled. They indicated that no agreement had yet been reached, despite the fact that bargaining had resumed and some progress, in particular on non-monetary issues, had been achieved. The union then requested a further suspension of the hearing to allow bargaining to continue. The employer objected to that request on the basis that the objective sought by the union's complaint, namely the resumption of bargaining, had been achieved through the June 1 order, there was no reason then to continue hearing this case. Because of the resumption of bargaining, and the fact that some elements of the collective agreement, in particular the monetary clauses, remained to be negotiated, the Board suspended the hearing until June 22.

On that date, the union informed the Board of its wish to withdraw the complaint. A complete and final agreement had not yet been reached, but additional bargaining sessions were planned. The union indicated that all its energy should be devoted to bargaining, not the complaint. For these reasons, the Board granted the union's request to withdraw its complaint, as well as the employer's earlier request. These decisions closed files 745-4232 and 745-4233.

A few weeks later, in its July 10 decision, the Board pointed out that the allegations of bad faith bargaining in the present case were still under deliberation. It then indicated that, in view of all the developments since the hearings ended in February 1992, it needed to be advised of the union's intentions regarding the complaint.

On August 31, 1992, the union asked the Board to continue staying its deliberations. On September 30, the union presented a detailed request for leave to amend its January 10, 1991 complaint in order to supplement certain facts. It was its opinion that these showed that the employer had breached, and was still in breach of, its obligation to bargain in good faith.

Some of these facts showed anti-union animus on the employer's part, a sentiment which the union claimed was demonstrated during the arbitration hearings in the 11 grievances arising from the same events that gave rise to the complaints dismissed by the Board in July 1992. It also alleged that this anti-union animus was also on display before the arbitrator who heard the grievances of flight attendants Joseph and Lauzon, whose complaints the Board dismisses in these reasons. Other allegations pertained to the employer's conduct after June 22, 1992, namely, its attitude at the bargaining table and the imposition of several disciplinary measures on the locked-out flight attendants. Finally, the union alleged that, since bargaining began in November 1990, the employer's attitude and conduct had undermined the union's credibility and its ability to represent its members. This is what allegedly led to the filing of an application for certification by another union in September 1992.

The employer objected to the request to amend the January 10, 1991 complaint as through the filing of a new complaint, the union had openly acknowledged that the January 10, 1991 complaint was limited in time and could not be reactivated with facts concerning subsequent events. The employer added that the principles reaffirmed in Iberia Airlines of Spain (1990), 80 di 165; and 13 CLRBR (2d) 224 (CLRB no. 796), could not be applied to the present case.

At the February 1992 hearings, the employer objected to the Board's hearing evidence of events subsequent to January 10, 1991, the date on which the bad faith bargaining complaint was filed. The Board, relying on well-established principles, rejected this argument. These principles hold that collective bargaining is an ongoing process and that the Board, when it receives a section 50(a) application, has the necessary jurisdiction to examine all the facts pertinent to determining the question, including facts concerning events subsequent to the date on which the complaint is filed (see Iberia Airlines of Spain, supra). The employer supplemented its reply by stating, subsidiarily, the facts and events that, in its opinion, demonstrated its good faith and the reasonable effort it made to settle its dispute with the union.

In considering the request to amend, the Board took into account the procedural context in which it was made and its jurisdiction regarding complaints of bad faith bargaining, i.e., the examination of the evidence and the settlement of the complaint having regard to the collective bargaining process as a whole.

Since January 1991, the union has made procedural decisions regarding how it exercises its recourse under section 50.

Thus, when the first complaint was still under deliberation, the union sought authorization from the Minister of Labour to file a new complaint regarding behaviour it considered contrary to section 50(a) of the Code. It did receive consent, and eventually withdrew this complaint.

It is not up to the Board to pass judgment on those decisions. However, they have to be taken into account when the union is asking that the investigation into the first complaint be reopened and that the Board rely to this end, on facts concerning events preceding or following the filing of the second complaint.

In the instant case, the Board does not deem it appropriate to allow change to the first complaint in order to hear evidence concerning the allegations contained in the request made on September 30, more than six months after the investigation ended. The Board does not believe that justice and the sound administration of the Code would be better served if it were to depart from the procedural course adopted previously by the union.

That decision does not prevent the union from appealing again to the Minister of Labour if it feels that these facts and events or this conduct contravene section 50 of the Code.

The instant decision disposes of a procedural matter that is part of a very specific factual situation. In no way does it call into question the principles established concerning the Board's jurisdiction to hear evidence concerning all the relevant events preceding and following the filing of a complaint of bad faith bargaining, or to grant a request to amend a complaint or any other procedural matter before it.

The request to amend the complaint of bad faith bargaining is dismissed.

The Complaint of Bad Faith Bargaining of January 10, 1991

The Board must now decide the merits of the first complaint of bad faith bargaining.

The January 10, 1991 complaint deals with two series of events and actions that allegedly show that the employer bargained in bad faith. First, there are the disciplinary measures imposed on the flight attendants who refused to work the Fort Lauderdale-Mirabel flight on December 10, 1990, as well as the measures imposed on Ms. Joseph and Mr. Lauzon. The Board heard lengthy evidence on the first series of disciplinary measures and found, in July 1992, that there was no reason to hear those complaints and that the grievance arbitration process should be allowed to take its course. It makes the same determination in the instant case regarding the complaints of Ms. Joseph and Mr. Lauzon, a form of dispute resolution for which the union itself opted.

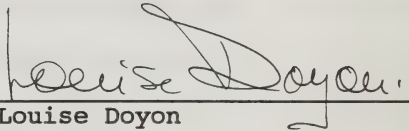
The imposition of disciplinary measures in December 1990, when bargaining had been going on for a few weeks, is not evidence, in the Board's view, of bad faith on the employer's part. It may be, as the union president explained, that the flight attendants were surprised at the employer's decisions and that those decisions led them to question the meaning and purpose of the disciplinary measures, given that they coincided with the start of collective bargaining. The Board does not believe, however, that this element leads it, to conclude in the instant case,

that this is evidence of bad faith associated with the bargaining process.

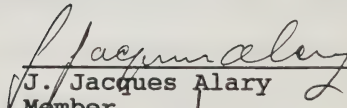
The second element on which the union bases its allegations pertains to the employer's conduct during the process of collective bargaining. A review of the documentary evidence and the testimony of Messrs. Huot and Tchoryck concerning the conduct of bargaining reveals that each side tried to further its priorities and have them accepted by the other side. The evidence, however, does not reveal that, during the period covered by the evidence, the employer displayed attitudes and behaviour that could be characterized as bad faith.

For these reasons, the complaint of bad faith bargaining of January 10, 1991 is dismissed.

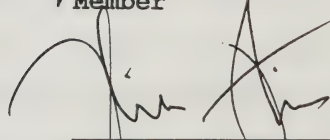
This is a unanimous decision. File 745-3830 is now closed.



Louise Doyon
Vice-Chair



J. Jacques Alary
Member



François Bastien
Member

ISSUED at Ottawa, this 16th day of November 1992.

Information

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Résumé

Richard Champagne et autres,
plaignants, et Service de
courrier Loomis Ltée, employeur
intimé.

Dossier du Conseil: 745-4077

Décision n°: 974

Les plaignants ont été congédiés
un mois après le début d'une
grève légale au motif qu'ils
auraient posé des gestes illégaux
qui ont entraîné la présentation
d'accusations criminelles contre
eux.

Le Conseil, après avoir considéré
l'ensemble de la preuve, a conclu
que l'employeur ne s'était pas
déchargé de son obligation de
convaincre le Conseil qu'aucun
sentiment antisyndical n'a
influencé ses décisions. La
façon dont l'employeur a décidé
d'imposer les mesures
disciplinaires, associée au
caractère contradictoire de la
preuve, a amené le Conseil à
conclure que les plaintes de
pratiques déloyales alléguant
violation du sous-alinéa
94(3)a)(vi) du Code étaient
fondées.

Après avoir rappelé l'affaire
Rogers Cable T.V. (British
Columbia) Ltd. (1987), 69 di 17;
16 CLRBR (NS) (CCRT n° 616), le
Conseil a distingué les faits de
cette affaire du cas présent. Il
a déclaré qu'il ne suffit pas
d'alléguer que des employés ont
eu des comportements qui peuvent
donner ouverture à des
accusations criminelles pour
convaincre le Conseil que
l'imposition de mesures
disciplinaires pour ce motif,
dans le cadre d'une grève ou en
raison de la participation à une
grève, libère l'employeur de
démontrer qu'il n'était pas
animé d'un sentiment
antisyndical.

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Summary

Richard Champagne et al.,
complainants, and Loomis Courier
Service Ltd., respondent
employer.

Board File: 745-4077

Decision no.: 974

The complainants were dismissed
one month after the start of a
lawful strike because they
allegedly had committed unlawful
acts for which they had been
criminally charged.

The Board, after considering the
whole evidence, concluded that
the employer had not discharged
its duty to satisfy the Board
that its decisions were not
tainted with anti-union animus.
The method used by the employer
to take disciplinary action
together with the contradictory
nature of the evidence led the
Board to conclude that the
complaints alleging violation of
section 94(3)(a)(vi) of the Code
were founded.

The Board cited Rogers Cable T.V.
(British Columbia) Ltd. (1987),
69 di 17; and 16 CLRBR (NS) 71
(CLRBR no. 616), comparing the
facts of that case to those of
the present case. It declared
that it is not sufficient to
allege that employees acted in a
manner for which they could be
criminally charged to satisfy the
Board that the disciplinary
measures imposed for this reason,
during a strike or as a result of
the participation in a strike,
releases the employer from its
obligation to establish that its
actions were not tainted with
anti-union animus.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Richard Champagne, Claude
Dulude, Yvon Laquerre, Daniel
Leclair, Camil Mailloux, Joe
Melo and Rolland Therrien,

complainants,

and

Loomis Courier Service Ltd.,
respondent employer.

Board File: 745-4077

The Board was composed of Ms. Louise Doyon, Vice-Chair, and
Ms. Ginette Gosselin and Ms. Evelyn Bourassa, Members.

Appearances

Ms. Sylvie Gosselin, for the complainants; and
Mr. François Bouchard, accompanied by Mr. Harry G. Eamon,
vice-president for the Eastern region, for the employer.

These reasons for decision were written by Ms. Louise Doyon,
Vice-Chair.

I

The Proceedings

On November 13, 1991, the Board received seven unfair labour
practice complaints in which Richard Champagne, Claude
Dulude, Yvon Laquerre, Daniel Leclerc, Camil Mailloux, Joe
Melo and Rolland Therrien (the complainants), alleged that
they were unlawfully dismissed by their employer, Loomis
Courier Service Ltd. (Loomis), because they exercised a
right conferred by section 94(3)(a)(vi) of the Code, which
reads as follows:

"94.(3) No employer or person acting on behalf
of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

...

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;..."

On November 18, 1991, Yvon Laquerre also filed an unfair labour practice complaint.

The Board consolidated the seven complaints in one file and heard the parties at public hearings held in Montréal on May 5 and June 25 and 26, 1992.

Messrs. Champagne and Laquerre were not present at the hearing on May 5. Ms. Gosselin, who had been retained by Mr. Laquerre to represent him, was not able to explain her client's absence. Richard Champagne, for his part, had not designated a representative. Prior to the hearing on June 25, the Board made sure that the complainants understood that if they did not appear at the hearing on June 25 and 26, it would dismiss their complaints without further notice. Since the complainants did not appear, the Board therefore dismissed their complaints on July 3, 1992.

It was agreed that the Board would begin by hearing jointly the complaints of Messrs. Dulude, Leclair, Mailloux and Melo, which contained facts common to all. It was agreed that Mr. Therrien's complaint would then be heard and that all relevant evidence already presented would be added to the file.

II

1. The Complaints of Messrs. Dulude, Leclair, Mailloux and Melo

A. The Facts

The employer alleged that it dismissed the four employees because, on August 2, 1991, they committed unlawful acts in that they followed, intimidated and struck Guy Allard, a driver who was working for Loomis, during the course of his duties. Criminal charges were subsequently laid and the employer therefore decided to dismiss the complainants.

Since July 17, 1991, Loomis employees were taking part in a lawful strike. The dismissed employees worked at the employer's establishment located at 9495 Trans-Canada Highway, in Saint-Laurent. This strike also affected the employer's establishments in Drummondville, Sherbrooke, Québec (in part) and Rivière-du-Loup (for a short time). All parties agreed that the first days of the strike were very turbulent, especially on the picket line. The complainants testified that the atmosphere was very tense because the company continued to operate and because municipal police officers were often present near the picket line. As soon as the strike began, the employer hired security guards and installed electronic surveillance systems in close proximity to its property in Saint-Laurent. Agency personnel and some bargaining unit employees, including Mr. Allard, worked for Loomis during the strike. There were clashes and various exchanges between the strikers and the persons who crossed the picket line. This resulted in the granting, on July 23, 1991, of an injunction limiting the number of picketers. Motions for contempt of court were filed and a number of criminal charges for

assault, misconduct or damage to property were laid against the strikers during that period. The vast majority of office employees, who were members of the bargaining unit, continued to work during the strike. At the time, some 40 people per shift were working as drivers, the majority being replacement workers. Before the strike, this number ranged from 50 to 55 per shift.

On the morning of August 2, 1991, around 9:30 a.m., Guy Allard, who had been working for Loomis since June 17, 1991, left the employer's establishment at the wheel of a rental truck bearing a Location Express logo in order to make a delivery. The complainants, who were on the picket line at the time, left a few minutes after Mr. Allard, in two automobiles, one belonging to Mr. Leclair and the other to Mr. Melo. Mr. Dulude rode with Mr. Leclair, and Mr. Mailloux with Mr. Melo.

According to the employer, they then decided to follow Mr. Allard in order to intimidate and threaten him because he, not being a union member, had decided to continue working during the strike.

Mr. Allard gave his version. As he was leaving the employer's premises, he spoke to Mr. Melo who was getting ready to leave the picket line. They told each other in unflattering terms what they thought of one another, stating that they would definitely be seeing one another again at some point. The two vehicles driven by the strikers followed Mr. Allard to a service station, located on the service road of the Trans-Canada Highway, where he stopped to fill up. This service station is used only by business customers with special credit cards. The service station is approximately half a kilometre from the employer's establishment, a six-to-eight-minute drive. During this

time, the two automobiles took turns following, preceding or passing Mr. Allard's truck in a careless or, to say the least, persistent manner. They thus tried to intimidate Mr. Allard.

At the service station, Mr. Allard stopped his vehicle between two sets of gas pumps. Mr. Melo positioned his vehicle ahead of Mr. Allard's truck and Mr. Leclair pulled up behind him. As a result, the truck could not move until one of the automobiles moved. The occupants of the vehicles remained inside their vehicles for three or four minutes. Mr. Allard got out of his truck, carrying a camera. He wanted to take pictures of the strikers. That morning, the employer had given Mr. Allard and all other replacement drivers a camera in order to photograph and later identify anyone who followed, harassed and intimidated them in the course of their duties. At that point, Messrs. Melo and Mailloux got out of their vehicle. When Mr. Allard tried to take a picture of Messrs. Leclair and Dulude, who were still inside the vehicle behind his, they got out of their vehicle. According to Mr. Allard, he was no longer free to operate the camera because Messrs. Melo and Dulude physically prevented him from doing so by grabbing and restraining him. Mr. Allard then shielded the camera with his body. Messrs. Dulude and Melo then tried to calm him by telling him they merely wanted to talk to him. During the incident, Mr. Dulude punched Mr. Allard on the lower lip, injuring him slightly. Complainants Mailloux and Leclair witnessed the incident but did not participate in it. Mr. Allard subsequently took pictures and telephoned the police and the employer.

Marc Carbonneau, then director of security and quality control for Loomis, and François Galarneau, manager of the Saint-Laurent branch, met Mr. Allard at the service station.

When they arrived, the complainants were still there. The company representatives did not speak to them. They questioned Mr. Allard, as well as the service station manager and two customers. Not one of the latter three had witnessed the incident. The police arrived shortly thereafter. They questioned Mr. Allard and arrested the complainants. The company representatives and Mr. Allard went to the police station and from there to the medical clinic to have Mr. Allard's condition checked.

Mr. Allard had taken four pictures. Although he could not specify the exact order, one picture, taken on the way to the service station, showed one of the two complainants' cars in front of Mr. Allard's truck. Another picture, showing Mr. Leclair, was taken before the altercation, and the other two, one showing Mr. Leclair's vehicle and the other Messrs. Melo and Mailloux, were taken after the incident.

The complainants' versions differed from Mr. Allard's. They left the picket line around 9:30 a.m. on August 2 in two vehicles, belonging respectively to Messrs. Melo and Leclair. They were heading to the local union office on Everett Street in Montréal-Nord to collect their strike pay. The complainants do not agree on the time they noticed Mr. Allard and his vehicle on the road. Each admitted recognizing Mr. Allard who was driving a white vehicle without any Loomis identifying marks, but familiar to the strikers because it regularly crossed the picket line. According to the complainants, the truck was in front of them all the way and at no time did either of the two vehicles pass or travel in front of Mr. Allard's vehicle.

The complainants decided to stop at the service station when they saw Mr. Allard turn into it. They claimed that they

wanted to speak to him and explain that the strike was lawful and that it was important for all employees concerned to take an active part in the strike and not work while it continued. They admitted that the Code did not prohibit the company from continuing to operate, but added that they wanted to inform Mr. Allard of their position, an action which was not prohibited by the Code.

The complainants corroborated Mr. Allard's version concerning the arrival of the vehicles at the service station. However, according to them, when Mr. Allard got out of his vehicle, he tried to attack Mr. Leclair who had approached him near the truck to speak to him. It was at that point that Messrs. Melo and Dulude approached Mr. Allard and tried to restrain him. He was very agitated and was threatening them. The complainants then realized that Mr. Allard was slightly injured. They denied striking or manhandling him. The injuries were the unintentional result of the jostling that took place.

The complainants were then questioned and arrested by the police. Messrs. Dulude and Melo were subsequently charged with assault and intimidation, and Messrs. Leclair and Mailloux with intimidation. They entered not-guilty pleas and were acquitted of the charges on a technicality, according to the information provided to the Board.

The complainants were not elected union representatives or officers, but were considered to be very active in the strike movement. They picketed regularly and visited Loomis customers to inform them that a strike was in progress. They claimed that the employer had dismissed them on August 23, some 20 days following the events in question, to prevent them from engaging freely in union activities sanctioned by the Code. These dismissals also enabled the

employer to get rid of union activists. The complainants stated that the employer did not follow the normal and usual disciplinary procedure: it did not contact them to obtain their version of the facts, either before or after their dismissal. In their opinion, the reason given by the employer, namely, that the criminal charges warranted their dismissal, did not withstand scrutiny. Similar charges were laid against at least four or five other strikers, but the employer did not discipline or take reprisals against them. According to the complainants, this was evidence of discriminatory behaviour and clearly showed that the employer's motives were unlawful.

The employer admitted that it had not communicated with the complainants to obtain their version of the facts; the strike had prevented it from doing so. It also admitted that it had not disciplined other strikers against whom criminal charges had been laid. The employer stated that it consulted its legal advisers and that it made the decision that seemed appropriate in each case, having regard to the nature of the criminal offences. The vice-president of Loomis for Eastern Quebec, Harry G. Eamon, stated that, in the complainants' case, the intimidation and assault to which Mr. Allard was subjected was the one and only ground for dismissal. This alone was sufficient cause, in particular the fact that there was physical aggression, and the employer assumed that these acts had been committed inasmuch as Mr. Allard informed it that criminal charges had been or would be laid in the wake of the August 2 incident at the service station.

B. Decision

The Board must determine whether, in deciding to dismiss the four complainants for the reasons given, the employer was

motivated by anti-union animus or made its decision in the normal course of exercising its right to manage and administer its business.

Section 98(4) of the Code reads as follows:

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

This provision imposes on the employer the burden of satisfying the Board that the refusal to continue to employ the complainants was not motivated, in the instant case, by their participation in a strike that is not prohibited by Part I of the Code or by their exercising a right under that Part.

The reason given in this case - and the only reason given - is that the complainants behaved in an unacceptable manner when, on August 2, they intimidated and assaulted another employee in the course of his duties. The Board must determine whether this reason is the real reason that prompted the employer to dismiss the complainants. To this end, the Board must be satisfied that the employer is telling the truth. It does not have to decide whether the employer had valid, just and sufficient cause or whether the penalty imposed is commensurate with the alleged offence.

The evidence concerning the August 2 events is contradictory in several respects, whether regarding what transpired during the trip to the service station, or with respect to the details of the incident at the service station.

There is no doubt that there was physical contact and very explicit verbal exchanges between Messrs. Allard, Dulude and Melo at the service station. The evidence, however, does not establish, as clearly as the employer claims, the circumstances that led to this confrontation or the degree of responsibility of each of the three protagonists in this whole matter.

The employer has not satisfied the Board that the reason it gave for dismissing the complainants is the real reason. Not only is the evidence contradictory, but the employer's reactions and conduct also have led the Board to question its real motives.

The first factor the Board took into consideration in this regard is the manner in which the employer decided to dismiss the employees. It did not do so immediately, but two weeks after the incident. This was long enough to allow the employer to conduct a full and serious investigation of the events by obtaining the version of all involved, including the complainants' version. However, it limited itself to examining Mr. Allard's version of the facts and trying to obtain the versions of the manager and customers of the service station. It did not question the complainants or take into account their disciplinary records. The investigation procedure this employer normally applies in disciplinary matters was not followed. The Board does not believe that the strike prevented it from following this procedure.

The second factor the Board considered is the employer's decision to dismiss the complainants upon learning that criminal charges had been laid against them. The employer was very clear in this regard: if the information gathered by the police supported the charges, it must be assumed to

be true from the outset and sufficient in itself to warrant dismissal. This judgment was somewhat flawed because other employees against whom similar charges were laid did not suffer the same fate. Mr. Eamon attributed this different treatment to the nature and seriousness of the acts committed by the complainants. This explanation might be acceptable, and the Board would not have to assess its validity, had the employer conducted a genuine investigation and made a decision based on verifiable and verified information. That was not the case. In this regard, one fact is surprising. Had the employer conducted a genuine investigation, it would have learned that Messrs. Leclair and Mailloux had not taken part in the incident at the service station. The evidence presented, however, suggests that it probably knew this fact when it dismissed the complainants because Mr. Allard himself confirmed it at the hearing, unless he gave the employer a different version at the time of the incident. In any case, had the employer conducted a full investigation, it could have examined all relevant facts. Its failure to do so strengthens the Board's belief that the real reason is not the reason given by the employer.

The final factor the Board took into consideration in examining the employer's reasons is the knowledge it had of the complainants' role in the strike. They were among the most active strikers and were considered leaders, although this was less clear in Mr. Mailloux's case. According to one witness, they did more than the required amount of picketing. They were neither union officers nor representatives, but they in fact had a decisive influence.

In the present case, the Board concludes, having regard to all facts presented to it, and in particular to the combination of factors that determined the employer's

attitude and behaviour during the August 2 incident, that the employer used this episode to dismiss overzealous strikers. If this adjective does not apply with the same degree of accuracy to Mr. Mailloux, the fact remains that he suffered the same fate, without distinction, simply because he was at the scene of the incident.

This incident is regrettable in itself. Clearly its causes are many, and it is not up to the Board to assess their validity or determine their importance. It must, however, examine the incident having regard to the context in which it occurred, namely, a lawful strike that, at least in the beginning, was especially turbulent, as everyone acknowledged. In the instant case, the Board finds that the August 2 incident is not a reason that could reverse the burden of proof that the Code places on the employer and establish that the employer did not contravene section 94(3)(a) of the Code.

In Royal Bank of Canada, Jonquière and Kénogami (1980), 42 di 125 (CLRB no. 279), the Board had before it complaints contesting the dismissal of strikers in circumstances comparable with those of the present case. In that case, the Board, after noting that the employer had to prove not only that it had legitimate reasons for dismissing the employees, but also that its actions were not motivated by any anti-union animus, said the following:

"The Bank alleged that it had not been motivated by any anti-union animus in proceeding with the dismissals. It argued that around mid-October, in the exercise of its managerial powers, it had established guidelines on the application of disciplinary measures. By adhering strictly to those criteria, it had arrived at the eight dismissals under study and on seven of which the Board heard evidence.

Considering all of the evidence and the development of events in this dispute, the Board is not convinced that there has [not] been any anti-union animus.

The Board noted that the Bank's attention had focused on three groups of strikers, namely those at the Kénogami branch, at the St-Dominique branch in Jonquière and at its La Baie branch.

The dismissals have been distributed almost evenly among those three branches, although in our opinion, each and every striker in these three branches had been responsible for the same acts and the same utterances that had meant dismissals for a few of them. In fact, three of them, Lucette Tremblay, Lyne Bellemare and Marie Lapointe, belonged to the Jonquière staff; two of them, Louise Fortin and Doris Gagnon, to the Kénogami branch staff, and lastly, three of them, Jocelyne Lavoie, Claudine Barbeau and Jeanne Michaud, worked at the La Baie branch.

The contrast between the inconsistency with which disciplinary measures were imposed on the strikers who had committed almost identical acts, and the consistency with which the dismissals were handed out and timed to coincide with developments or lack of developments at the bargaining table carries weight in the Board's decision that the Bank, through those dismissals, has sought to break the strikers' backs so that they would abandon their union or be dissuaded from exercising their right to participate in a strike that was not prohibited under the Code."

(page 162; emphasis added)

Similar questions were raised by the Ontario Labour Relations Board in International Wallcoverings, A Division of International Paints (Canada) Ltd. (1983), 4 CLRBR (NS) 289, and by the British Columbia Labour Relations Board in Adams Laboratories Limited et al., [1980] 2 Can LRBR 86.

In the latter decision, the B.C. Board, after reviewing certain decisions dealing with the test applied in assessing anti-union animus during the examination of unfair labour practice complaints, said the following:

"From the short summary of the relevant decisions, it appears that there is little doubt about the general theory of the protection offered by the statute to employees who may have been discharged for their involvement with the union. The theory is easy enough to understand. It is the facts of each case that cause the trouble, and the most difficult is the mind of the employer. That state of mind will usually have to be inferred from all of the circumstances, and the process is largely guesswork. An employer who has shown an obvious interest in frustrating the advances of a union

may still be firing for a unrelated cause. An employer who has managed to put forward the outward appearance of neutrality may in fact have an ulterior motive. All that a Board can do is to determine to the best of its ability whether it is more likely than not that an anti-union animus was one of the reasons for the termination of an employee."

(Adams Laboratories Limited et al., supra, pages 91-92)

The B.C. Board also took into consideration the manner in which the employer had treated its employees who had committed identical or comparable acts in determining whether or not there was anti-union animus. It said the following in this regard:

"... When this is taken into consideration, I cannot say that I am persuaded on a balance of probabilities that there was not an anti-union motive in this selective approach to dismissals. ..."

(page 96)

That reasoning applies to the present case.

In Rogers Cable T.V. (British Columbia) Ltd. (1987), 69 di 17; and 16 CLRBR (NS) 71 (CLRB no. 616), the Board dismissed complaints of unfair labour practice contesting the imposition of disciplinary measures on certain employees for committing acts such as yelling and swearing, puncturing tires on company vehicles, pounding vehicles with pieces of wood, breaking mirrors on vehicles, opening propane valves on vehicles or cutting cables to disrupt service.

Unlike the finding in the instant case, the Board's finding in that case was as follows:

"The evidence also clearly shows that the employer did not, or does not intend to discipline the eight union members because they participated in a lawful strike. The discipline

has nothing to do with the withdrawal of their labour or their participation in normal picket line activities. ..."

(Rogers Cable T.V. (British Columbia) Ltd., supra, pages 38; and 93)

Given the nature of the allegations made against the employees, the Board deemed it appropriate to add the following:

"... Without in any way adjudicating upon the merits of the allegations against the union members affected by this complaint, we would like to make it clear that acts of violence or of wilful damage or any other such unlawful acts are not lawful activities of a trade union that are guaranteed as fundamental rights under section 110 of the Code. Nor do they fall within the protection offered by section 184(3)(a)(vi) of the Code.

Taking everything into consideration, we find that the employer has not contravened section 184(3)(a)(vi) of the Code as alleged. The complaint is dismissed."

(pages 38; and 93)

Given the apparent similarity between that case and the instant case, this Board panel hastens to add that the present decision does not call into question that policy statement.

On the other hand, it is important to point out that it is not enough to say that some employees behaved in such a way as to warrant the laying of criminal charges in order to satisfy the Board that disciplining employees for this reason, in the context of a strike or because of participation in a strike, is necessarily devoid of anti-union animus. Each case is distinct and must be assessed in the light of established principles. The facts of the present case differ from those in Rogers Cable T.V. (British Columbia) Ltd., supra, as does the decision in the present case.

2. Mr. Therrien's Complaint

Rolland Therrien was dismissed on August 23, 1991 because, according to the employer, he committed acts of gross indecency on August 8 and 16, 1991 while on the picket line. Moreover, on August 16, Mr. Therrien allegedly damaged a rented vehicle used by Loomis to carry on its operations during the strike. The truck sustained some \$500 in damage. The letter of dismissal explains that the acts of gross indecency on August 16 were directed at two employees, but the employer was able to establish the identity of only one of these employees, Alain Nobert.

The employer described the August 8 incident as follows. Mathieu Noreau is a security guard who has worked for Loomis for three years. From the beginning of the strike, he was primarily responsible for the surveillance of trucks arriving at the Saint-Laurent establishment. On August 8, 1991, around 5:30 p.m., the picketers, including the complainant, advanced towards the employer's property. It was then that Mr. Therrien made offensive remarks to him. Mr. Noreau drafted a written report on the incident that same evening, and Mr. Carbonneau read it the following day. This report was produced at the hearing. It was the evening shift supervisor who told Mr. Noreau that the person in question was Rolland Therrien.

The employer's evidence concerning the August 16 events can be summarized as follows. Alain Nobert, who had been a replacement driver from the beginning of the strike, arrived at the employer's establishment in mid-afternoon, at the wheel of a truck bearing the Location Express logo. He parked the vehicle at the loading dock at the rear of the establishment. He got out of his vehicle, at which point Mr. Therrien, who was picketing with five strikers, feigned

masturbation and made offensive remarks to him. Mr. Nobert went to see Mr. Carbonneau to inform him of the incident. Mr. Carbonneau came out of the establishment and when Mr. Nobert pointed the complainant out to him, he said that they knew him, that he was a clown. Mr. Carbonneau then said to Mr. Nobert to forget it and told him to unload the truck, as planned. As Mr. Nobert made his way back to the warehouse, the complainant continued shouting "scab" and "job thief" at him.

As Mr. Nobert was preparing to get into the truck, Mr. Therrien threw a stone at the windshield. At that point, the complainant was approximately 15 metres from the truck and was surrounded by five or six strikers.

Mr. Nobert went back to see Mr. Carbonneau. The latter telephoned the supervisor to ask him to take pictures and then telephoned the police. The police arrested the complainant after questioning the driver. Criminal charges were laid against Mr. Therrien in connection with the damage to the windshield. Mr. Nobert knew the complainant to see him and described him as an active, cheerful and happy striker. He drafted a report following the August 16 incidents. The pictures taken following the windshield incident and Mr. Nobert's report were not produced.

Mr. Carbonneau recommended that the complainant be dismissed after the August 8 and 16 incidents, relying in particular on the criminal charges in connection with the damage to the windshield. The complainant had received a disciplinary notice two weeks before the strike began, but according to the employer, this notice had not entered into the dismissal decision.

Mr. Therrien's version of the facts is as follows. He has worked for Loomis since 1986. Apart from the above-mentioned disciplinary notice, his disciplinary record is clean. From the outset, he played a very active role in the strike, including its organization. He organized the picket lines and visited Loomis customers to inform that the drivers had not resigned, as the employer would have them believe, but were engaged in a lawful strike. Mr. Therrien categorically denied the incidents of gross indecency. He admitted that, on August 16, he spoke to Mr. Nobert, while he was on the picket line with a few other strikers. The remarks reported by Mr. Nobert were accurate, but Mr. Therrien added that Mr. Nobert replied that he should not have gone on strike and he was a damn fool to have done so. With regard to the windshield incident, Mr. Therrien denied any responsibility. However, he stated that he too heard and saw that day that the windshield of Mr. Nobert's truck had been damaged. Mr. Therrien did not meet with the employer before his dismissal to give his version of the facts. He pleaded not guilty to the criminal charges against him and was awaiting a judgment when the hearing in the present case took place.

B. The Decision

The evidence presented in support of the reasons alleged for dismissing Mr. Therrien appears to be no less contradictory than the evidence presented in the other complaints that the Board decided earlier. The witnesses gave conflicting versions of the events that led the employer to dismiss the complainant. The employer did not discharge its burden of satisfying the Board that it dismissed the complainant for the reasons given.

The evidence shows that the allegations of gross indecency became serious incidents of major importance following the windshield incident, whereas only a few minutes earlier, Mr. Carbonneau had said to Mr. Nobert to forget it and had told him to carry on with his work. With regard to the August 8 incident, Mr. Carbonneau had Mr. Noreau's report in his possession since August 9 and did not launch a specific investigation of its contents until the August 16 events.

The employer's perception changed when it believed that it could link these allegations of gross indecency with another incident that could be more serious. In this sense, it appears to the Board that had the windshield incident, for which the complainant was held responsible, not occurred, the employer would not have taken disciplinary action based on alleged acts of gross indecency. These acts, insignificant though they were, became, for the employer, cause for dismissal. The Board finds that these allegations were a pretext, and not the real reason, for the dismissal. Nor is the Board satisfied that the allegations in connection with the windshield incident are the real reason for the dismissal, having regard to the particular circumstances of the instant case.

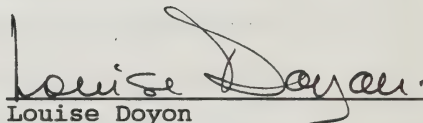
The employer's motives in deciding to impose the measure in dispute were the same as in the case of the other four complainants. The Board is not satisfied that the decision to dismiss Mr. Therrien was not motivated by anti-union animus. The reasons that led the Board to decide that the dismissals of Messrs. Dulude, Leclair, Mailloux and Melo constitute practices prohibited by the Code apply to Mr. Therrien's case.

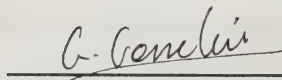
For these reasons, the Board:

- . allows the complaints of Claude Dulude, Daniel Leclair, Camil Mailloux, Joe Melo and Rolland Therrien;
- . rescinds the dismissals imposed on these employees in August 1991;
- . orders the employer to reinstate them immediately and to pay them compensation equivalent to the pay and other benefits they lost as the result of their dismissal, less any amounts they may have earned from other employment.

The Board appoints Ms. Suzanne Pichette, director of its Montréal office, or any other officer she may designate, to assist the parties in implementing these remedies.

This is a unanimous decision.


Louise Doyon
Vice-Chair


Ginette Gosselin
Member


Evelyn Bourassa
Member

ISSUED at Ottawa, this 18th day of November 1992.

information

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SUMMARY

CANADIAN UNION OF POSTAL WORKERS, APPLICANT UNION, AND URBAN PARCEL SERVICES LIMITED, AND HORTONS' TRUCKING SERVICES LIMITED, RESPONDENTS.

Board Files: 555-3461
560-290

Decision No.: 975

Application for certification. Section 24 of the Canada Labour Code (Part I - Industrial Relations). The Canadian Union of Postal Workers (CUPW) requests to be certified for a local trucking firm, Urban Parcel Services Limited (URBAN), performing contract work for Canada Post Corporation (CPC) in Halifax, N.S. Application granted.

Single employer declaration (section 35) sought by Hortons' Trucking Services Limited (HTSL), URBAN's sister company. Application denied.

RESUME

SYNDICAT DES POSTIERS DU CANADA, SYNDICAT REQUÉRANT, ET URBAN PARCEL SERVICES LIMITED, ET HORTONS' TRUCKING SERVICES LIMITED, EMPLOYEURS.

Dossier n°: 555-3461
560-290

Décision no.: 975

Demande d'accréditation. Article 24 du Code canadien du travail (Partie I - Relations du travail). Le Syndicat des postiers du Canada a demandé d'être accrédité à l'égard d'un groupe de camionneurs à l'emploi de Urban Parcel Services Limited (URBAN), une entreprise de camionnage local de la région de Halifax (N.-E.). URBAN exécute du travail à contrat pour la Société canadienne des postes. Demande accueillie.

La société soeur de URBAN, Hortons' Trucking Services Limited (HTSL), a demandé une déclaration d'employeur unique (article 35). Demande rejetée.



URBAN was created for the sole purpose of doing CPC contracts. It does mail and parcel collection, sorting and/or delivery on a long-term basis with CPC. URBAN employs truck drivers in Halifax, N.S., and in P.E.I. The union applied to be certified for the Halifax group. The Board's constitutional jurisdiction over URBAN, although not contested, was confirmed. The Board confirmed its jurisdiction over URBAN after having determined that URBAN was indeed integrated in the postal system (jurisprudence followed: Canada Post Corporation and Shoppers Drug Mart Limited (1987), 71 di 103; 1 CLRBR (2d) 218; and 87 CLLC 16,049 (CLRB no. 649), upheld by the F.C.A.; Muir's Cartage Ltd. and Canada Post Corporation (1992), as yet unreported CLRB decision no. 955; and Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211.

The Board further determined that HTSL, URBAN's sister company was not federal. (jurisprudence followed: Larose-Paquette Autobus Inc. (1990), 80 di 105; and 14 CLRBR (2d) 132 (CLRB no. 792) and Arrow Transportation Systems Inc. et al. (1992), as yet unreported CLRB decision no. 937)). The section 35 application was denied since two federal employers were not involved.

URBAN a été créée dans le seul but d'exécuter des contrats pour la Société canadienne des postes. URBAN fait la cueillette, le tri et la livraison du courrier et de colis en vertu de contrats à long terme. URBAN emploie des camionneurs à Halifax (N.-E.) ainsi qu'à l'île-du-Prince-Edouard. Le syndicat veut représenter le groupe de Halifax (N.-E.). La compétence du Conseil à l'égard de URBAN, quoique non contestée, a été confirmée. Le Conseil a confirmé sa compétence sur URBAN après avoir jugé qu'elle faisait partie intégrante du service postal (jurisprudence suivie: Société canadienne des postes et Shoppers Drug Mart Limited (1987), 71 di 103; 1 CLRBR (2d) 218; et 87 CLLC 16,049 (CCRT n° 649), confirmée par la Cour d'appel fédérale; Muir's Cartage Ltd. and Canada Post Corporation (1992), décision du CCRT n° 955, non encore rapportée; et Northern Telecom Limitée c. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; et 79 CLLC 14,211).

Le Conseil a également jugé que HTSL, la société soeur de URBAN, n'était pas de compétence fédérale (jurisprudence suivie: Larose-Paquette Autobus Inc. (1990), 80 di 105; et 14 CLRBR (2d) 132 (CCRT n° 792); et Arrow Transportation Systems Inc. et autre (1992), décision du CCRT n° 937, non encore rapportée). La demande de déclaration d'employeur unique présentée en vertu de l'article 35 a été rejetée vu l'absence de deux entreprises fédérales.

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CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

On the merits, the Board determined that the unit sought was appropriate and that the union had majority support. It allowed the application.

Sur le fond, le Conseil a jugé que l'unité de négociation demandée était habile à négocier et que le syndicat jouissait de l'appui de la majorité. Le Conseil a accueilli la demande.

Canada
Labour
Relations
Board
Conseil
Canadien des
Relations du
Travail

Reasons for decision

Canadian Union of
Postal Workers,

applicant union,

and

Urban Parcel
Services Limited,

and

Hortons' Trucking
Services Limited,

respondents.

Board Files: 555-3461
560-290

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Messrs. J. Jacques Alary and Michael Eayrs, Members.

Appearances:

Mr. Ronald A. Pink, Q.C., and Mr. Raymond F. Larkin,
assisted by Ms. Deborah Bourque for the Canadian Union of
Postal Workers; and

Mr. Eric Durnford, Q.C. and Mr. Malcom D. Boyle, assisted
by Mr. G.M. Horton, for Urban Parcel Services Limited and
Hortons' Trucking Services Limited.

These reasons for decision were written by Mr. Serge
Brault, Vice-Chairman.

I

THE PROCEEDINGS

On May 27, 1992, the Canadian Union of Postal Workers
(CUPW or the union) filed an application with the Canada
Labour Relations Board pursuant to section 24 of the
Canada Labour Code (Part I - Industrial Relations). The

union requested to be certified as the bargaining agent for a unit of truck drivers working for Urban Parcel Services Limited of Halifax, N.S.

Urban Parcel Services Limited (URBAN) was initially opposed to the application, on the basis that its operations were within the constitutional jurisdiction of the province of Nova Scotia and not that of the Government of Canada, and accordingly, that the Canada Labour Relations Board did not have jurisdiction in this matter. URBAN stated that if its employees fell within federal jurisdiction, then the appropriate bargaining unit should include URBAN's employees working in the province of Prince Edward Island involved in or integrally related to the delivery of first class mail for the Canada Post Corporation, including warehouse, garage, and delivery persons.

A hearing was set for August 4, 1992 in Halifax, N.S., to consider the jurisdictional issues. On the morning of August 4, the solicitor for URBAN informed the Board's officer in Dartmouth that URBAN was no longer contesting the Board's jurisdiction in this matter. When the parties appeared before the Board that day, they negotiated and signed a document relating to this application. It states that the facts contained in the Investigating Officer's Report in this matter "... are sufficiently accurate in describing an operation of a business (which includes as an employer, Urban Parcel Services Ltd.) within the federal constitutional jurisdiction."

At the hearing, URBAN also requested that it be granted time to file a revised reply because of the change in its position regarding jurisdiction. The Board granted the

request. As a result of the amended reply, each party was given time to file further submissions concerning issues other than jurisdiction. This led to the filing of a second report by the Senior Labour Relations Officer, Gordon MacIssaac. These Reasons for decision are based on Mr. MacIssaac's very thorough and well thought out reports.

On August 7, 1992, URBAN filed an amended reply where it formally recognized that URBAN did perform work under federal jurisdiction. URBAN also said that an "associated and related" company, Hortons' Trucking Services Limited (HTSL), also performed work under federal jurisdiction. URBAN asked the Board to declare URBAN and HTSL to be a single employer pursuant to Section 35 of the Code. As to the appropriateness of the bargaining unit, URBAN suggested that the unit should encompass all URBAN and HTSL employees performing work in connection with contracts between these companies and Canada Post Corporation (CPC or Canada Post). In short, for management, the unit should include the 18 or so positions proposed by the union and an additional 18 or so positions comprising the URBAN warehouse staff, URBAN drivers in P.E.I. and the drivers employed by HTSL in connection with three highway contracts between CPC and HTSL.

In written submissions dated August 14, 1992, the union, for its part, reiterated its position that the appropriate bargaining unit should be 18 URBAN drivers working in Nova Scotia. CUPW argued that the warehouse workers do not share a community of interest with the drivers and that the nature of their work is clearly different. The union added that should the Board decide to include the warehouse employees in the unit, two of those employees should be excluded on the grounds that they perform

management functions or are employed in a confidential capacity in matters relating to industrial relations. The two others should be excluded because they are the owners' parents.

As to the employer's request for a declaration of single employer under Section 35 of the Code, CUPW submits that an employer cannot request that the Board issue a single employer declaration and, even if it could, it would not be appropriate for the Board to do so in this case.

As far as we know, this is the first time that CUPW directly applies for certification with respect to private sector employees. This is probably why the employer challenged CUPW's status to properly represent employees of a private employer in light of what URBAN called the union's longstanding position of opposing privatization of postal services.

II

THE EVIDENCE

HTSL has operated for many years in the delivery and general trucking business in the Halifax-Dartmouth area and along the south shore of Nova Scotia. Urban was incorporated on April 10, 1989. However, HTSL was not incorporated, according to the Nova Scotia Registry of Joint Stock Companies, until April 18, 1989.

HTSL and URBAN have two owners. They are two brothers, Gordon and Kenneth Horton. Kenneth is the President and Director, and Gordon is also a Director and Vice-President/Secretary.

HTSL manages URBAN and, as well, two other trucking companies: Bub's Trucking Limited (Bub's) and Buzz's Light Delivery (Buzz's). Neither company has any work with or for CPC nor are they engaged in interprovincial trucking or in connection with any federal work or undertaking. HTSL manages two Shell service stations under the trade name "Urban Auto Service Centre." URBAN operates a fleet garage in Harrietsfield, Halifax County, where repairs and maintenance are performed on URBAN vehicles and other vehicles operated by the other trucking companies managed by HTSL (including HTSL itself). None of the employees at these trucking companies, or the service stations, handle any mail in connection with the CPC contracts.

URBAN was created in 1989 by HTSL for the sole purpose of fulfilling HTSL's CPC contracts described later on in these reasons. Canada Post is URBAN's only client in Nova Scotia. URBAN and CPC are parties to a formal contract outlining the rights and obligations of each party for the provision of specific services relating to parcel delivery. URBAN provides an expedited parcel delivery service for CPC in the Halifax-Dartmouth area of Nova Scotia. It operates as follows:

Each weekday morning at 4:00 a.m., URBAN dispatches a tractor trailer from its warehouse in the Bayers Lake Industrial Park to CPC's mail postal plant on Almond Street in Halifax where cages of parcels, double stacked, are waybilled and loaded on the URBAN trailer by CPC's personnel. The parcels are then transported by URBAN back to its warehouse in Bayers Lake where they are unloaded by the URBAN driver and sorted by URBAN employees in the warehouse according to postal codes. The parcels are then

loaded onto URBAN delivery vehicles by drivers and warehouse personnel and transported to residential and commercial customers throughout the Halifax-Dartmouth area by URBAN company drivers and brokers. There are usually three delivery dispatches daily: at 6:00 a.m., 8:00 a.m., and 10:00 a.m.

In the afternoon, the drivers switch from delivery to pickup in Halifax and Dartmouth. They visit commercial customers for parcel pickups, and also clear out parcels from CPC's postal stations and privately operated retail postal outlets, and deliver same to CPC's main postal plant on Almond Street in Halifax.

URBAN has a second contract with CPC to provide special services in the Bedford-Sackville area, just outside Halifax. The hours of work for the Bedford-Sackville service are from 7:00 a.m. to 6:00 p.m., Monday to Friday. Instead of only parcels, all types of mail, including letters, are handled in Bedford-Sackville. URBAN provides a shuttle service where parcels and other mail are picked up from several postal destinations in Bedford and Sackville and transported to CPC's mail postal plant in Halifax for sorting.

In addition, URBAN drivers clear out CPC letter boxes in Bedford and Sackville and deliver the contents to CPC's Almond Street postal plant. URBAN also puts bulk mail from commercial customers in CPC's letter carrier boxes in Bedford and Sackville for the CPC letter carriers to distribute. URBAN also delivers admail (flyers) from CPC's main postal station to retail postal outlets in Bedford and Sackville and to independent admail carriers. URBAN also delivers priority courier items for CPC and

offers "cash on delivery" (C.O.D.) service on certain parcels. URBAN company drivers and brokers also pick up parcels from the Bayers Lake warehouse each morning and deliver them to residential and commercial customers in Bedford and Sackville, similar to the Halifax-Dartmouth contract.

Employees working on these two aforementioned contracts work at and from URBAN headquarters located in the Bayers Lake Industrial Park, in Halifax, Nova Scotia. On the Bayers Lake site, URBAN has a large warehouse which is used for storing and sorting mail both from the Halifax-Dartmouth contract and the Bedford-Sackville contract.

URBAN has a third contract with CPC for the provision of certain services in Prince Edward Island. The work involved is identical to the arrangements under the Bedford-Sackville contract, except for differences in volume of mail. The employees working in connection with the Prince Edward Island contract are not proposed by CUPW for inclusion in the bargaining unit in this application.

The only contracts between HTSL and CPC provide for the following services.

(1) Highway Service between Halifax and Sherbrooke, N.S.

HTSL and CPC are parties to a contract for the period April 1, 1989, to March 31, 1994, for the daily pick-up and delivery of bulk CPC mail, including letters, parcels and flyers, in 16 communities between Halifax and Sherbrooke, N.S. It is a one truck, one person operation.

(2) Highway Service between Halifax and Liverpool, N.S.

The contract is for the period June 1, 1992, to May 31, 1995, and calls for the pick-up and delivery of CPC mail in several communities between Halifax and Liverpool. Like the Halifax and Sherbrooke contract, this contract provides for six days per week, year round operation, and a five-ton truck is used to transport the mail. This is a two part-time persons' operation.

(3) Revenue Canada Mail Shuttle

No employees of HTSL are presently employed in relation to this contract. The work was taken over by URBAN staff about one year ago. This contract provides for a shuttle service for Revenue Canada mail between its offices in downtown Halifax and the Halifax airport.

Currently, the revenue from these three contracts is the only source of revenue for HTSL, except for the fees paid by the other companies managed by HTSL, for administrative support services.

All regular URBAN company drivers are paid hourly and operate URBAN vehicles. URBAN also utilizes brokers, particularly at busy times. The brokers are not considered "employees" by URBAN, but independent contractors. They are not required to report to work daily, they do not receive any company benefits, are not issued uniforms, have no deductions made by URBAN from their pay, and are paid on a "per stop" basis. The brokers must supply their own vehicles and pay their own

expenses. On Monday of each week, which is usually the busiest day of the week, the complement of drivers would be about evenly divided between company drivers and brokers. For the rest of the week, it would average about 65% company drivers and 35% brokers.

The names of all newly hired URBAN employees, who have access to the mail, are forwarded to CPC by URBAN where they are screened by CPC for acceptance or rejection.

There is virtually no intermingling or interchanging of employees between HTSL and URBAN. HTSL and URBAN share the same premises, as well as the same administration and payroll. A fee is paid to HTSL from URBAN revenues for these administrative services.

III

RELATED APPLICATIONS

On May 1, 1989, CUPW filed three applications with the Board following the contracting out of parcel sorting and delivery services by CPC to 21 various contractors at several locations across Canada, including URBAN in Halifax. CUPW had asked the Board to declare that CPC and each such contractor is a single employer, that a sale of business has taken place, and that CPC has violated section 94 of the Code (Board Files 560-219, 585-339, and 745-3269 respectively). The Board decided in the fall of 1990 to hear these matters separately and only in regard to the single employer and sale of business applications, as they applied to one particular employer.

The first case heard, the only one at this point, dealt with Muir's Cartage Ltd. operating in the Metro-Toronto area (see Muir's Cartage Ltd. and Canada Post Corporation (1992), as yet unreported CLRB decision no. 955). There, the Board determined on the issue of jurisdiction that Muir's Cartage was under federal jurisdiction even though it was not engaged in interprovincial trucking. The Board's ruling was based on the fact that Muir's postal operations were an integral part of Canada's postal system and hence under federal jurisdiction. On the merits, the Board dismissed both the single employer and the sale of business applications as being ill-founded. The fate of those applications as they apply to URBAN is still pending.

IV

JURISDICTION

1. The Case of URBAN

The Board has thoroughly reviewed in Muir's Cartage Ltd. and Canada Post Corporation, supra, two types of contracts used by CPC with its local contractors. One is known as the Expedited Urban Parcel Service Contract and the other as the Tier Parcel Service Contract (see Muir's Cartage Ltd. and Canada Post Corporation, supra, pages 8 and following).

The Board reviewed URBAN's contracts in the context of this application. URBAN appears to be fulfilling both kinds of contracts considered in the Muir's case, as well as one highway service contract. With respect to our jurisdiction over URBAN, we do not see that the evidence

on record justifies a different finding from that made by the Board in Muir's Cartage Ltd. and Canada Post Corporation, supra. In that case, the Board drew from Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211 and Canada Post Corporation and Shoppers Drug Mart Limited (1987), 71 di 103; 1 CLRB (2d) 218; and 87 CLLC 16,049 (CLRB no. 649), upheld by the F.C.A., in order to set out three questions related to jurisdiction. Those questions are summarized as follows, in the present context:

1. Is Canada Post (CPC) a core federal undertaking?
2. Does part of URBAN's regular activities consist of postal operations and if so, do these operations constitute, in whole or in part, an integral part of CPC's business?
3. What is the practical and functional relationship between URBAN and CPC?

The answer to the first question is undoubtedly yes: Canada Post is federal.

As for the second question, the Board subdivided it in two parts in Muir's Cartage Ltd. and Canada Post Corporation, supra. First, it determined whether the contractor's activities could be considered as postal activities. The statements made by the Board with respect to Muir's activities are probably even more relevant in this case, since URBAN also handles standard mail as opposed to only parcels. Also, they are URBAN's only activities.

"... When Muir's picks up parcels from customers or from various postal facilities, sorts them, manifests them, stores them, delivers them, it does so by following Canada Post procedures every step of the way and from within Canada Post's own system. These parcels remain in CPC's custody throughout and are processed in the same manner Canada Post employees do it, albeit with different equipment. In doing so Muir's directly contributes to fulfilling the very purpose of Canada Post as defined in the latter's enabling legislation. That participation on Muir's part is extremely regular and closely monitored at all times by Canada Post."

(Muir's Cartage Ltd. and Canada Post Corporation, supra, pages 27-28)

The second subquestion which the Board addressed was whether Muir's activities were indeed an integral part of CPC's operation? In this regard, the Board had this to say:

"The evidence reveals that the customers served by Muir's are Canada Post customers, never its own. The activities of Muir's take place at various steps in an ongoing wholly integrated process: Muir's employees either receive parcels from Canada Post and sort and then deliver them; or they minimally sort them and deliver them back to Canada Post facilities for further processing. Without the participation of Muir's (or of another contractor), the Expedited program in Toronto would simply not work since Muir's involvement is at its very heart in operational terms. ..."

(page 28)

Thirdly, with respect to the practical and functional relationship between CPC and the contractor, the Board made the following observation:

"In practice, the links between Muir's and Canada Post are multifaceted and continuous, as noted above. Each day, Muir's employees are in close operational contact with Canada Post employees and the postal network. On a regular basis their actual work as well as the operational guidelines they have to comply to are monitored and altered by Canada Post. ..."

Muir's postal operations are totally linked to those of Canada Post and such link is the key to the success of that relationship...

... In summary, for constitutional purposes, we see no significant factor that would distinguish this case from the Canada Post Corporation v. Canadian Union of Postal Workers, supra [judgment rendered from the bench, file no. A-762-87, January 28, 1988; leave to appeal to the Supreme Court withdrawn], where the Federal Court of Appeal had this to say:

...

'It is clear the Manly's pharmacy business is provincial; but it is equally clear, in our view that the post office it operates under the franchise agreement is an integral part of the postal service of Canada over which, under subsection 91(5) of the Constitution Act, 1867, the Federal Parliament has exclusive legislative jurisdiction. ...'

(page 2)"

(pages 29-30)

The case at hand is quite clear. URBAN's sole activity is handling mail. It was created for that purpose in 1989, and it has since been exclusively dedicated to it. URBAN is consequently a federal undertaking.

2. The Case of HTSL

When one looks at HTSL's activities as they have evolved over the years, it is easy to distinguish them from those of URBAN. HTSL, as far as postal activities go, is for the most part a centralized management service. It is now a management company: it manages URBAN, Bub's, Buzz's, as well as two Shell service stations and, as of the date of application, a fleet garage. All things considered, no significant evidence suggests how HTSL could qualify as being federal. Its highway service contracts do not compare in nature to those of URBAN.

The factual data gathered by the Board's officer concerning the relationship between HTSL and CPC does not justify a finding that HTSL is involved with CPC in the kind of integrated relationship considered decisive in Canada Post Corporation and Shoppers Drug Mart Limited, supra, or in Muir's Cartage Ltd. and Canada Post Corporation, supra. HTSL is basically a provincial holding company.

HTSL and URBAN have a relationship of the kind analyzed by the Board in Larose-Paquette Autobus Inc. (1990), 80 di 105; and 14 CLRBR (2d) 132 (CLRB no. 792), where a centralized holding company managed different bus companies. Some of them, like the holding company and its school bus subsidiaries, were provincial, while one interprovincial bus company was found to be federal.

Such is the case of the HTSL family of companies. It has a number of provincial companies, as well as a federal one, URBAN. This being so, there is no point in considering any further whether HTSL and URBAN could come under a single employer declaration. Since only URBAN is a federal undertaking, and given the requirements of section 35 that at least two federal undertakings be involved, such a declaration cannot be made (see also Arrow Transportation Systems Inc. et al. (1992), as yet unreported CLRB decision no. 937).

V

THE MERITS

There is little that needs to be said about the merits.

Worth mentioning is the appropriateness of the bargaining unit. The union is seeking a unit of URBAN's drivers, based in Halifax. In their latest reply, URBAN suggested it also include warehouse staff, as well as URBAN's staff working on Prince Edward Island.

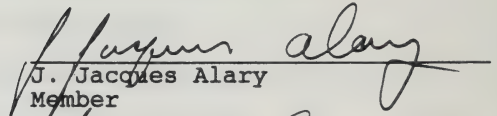
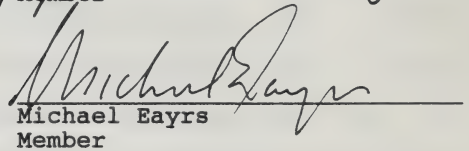
The Board has considered all the submissions and has come to the conclusion that a unit of the Nova Scotia drivers is appropriate. There may come a time where the unit might extend to others, but a unit of drivers remains natural and appropriate. The union does have majority support.

A final word on the employer's contention that CUPW's position against privatization might disqualify it for certification in the private sector. That proposition, in our view, is without foundation. CUPW has already established its status as a trade union pursuant to section 3 of the Code. It has been certified under this statute (Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675)). Part I of the Code does not link union status to an organization's opinions. If employees are not satisfied with the opinions or the actions of their otherwise properly constituted union, they have means to express their views.

For all these reasons, this application is granted. A formal certification order was issued to CUPW on November 12, 1992, with the understanding that the Board's Reasons for decision would follow.



Serge Brault
Vice-Chairman


J. Jacques Alary
Member
Michael Eayrs
Member

ISSUED at Ottawa, this 25th day of November 1992.

CLRB/CCRT - 975

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information

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SUMMARY

Nationair Canada Flight Crew Association, complainant, and Nationair Canada (Nolisair International Inc.), respondent.

Board's File: 745-4299

Decision No.: 976

RÉSUMÉ

Association des équipages de bord de Nationair Canada, plaignante, et Nationair Canada (Nolisair International Inc.), intimée.

Dossier du Conseil: 745-4299

Décision n°: 976

This decision deals with a complaint of unfair labour practice filed by Nationair Canada Flight Crew Association, alleging violation of section 50(b) of the Canada Labour Code.

In April 1992, the Association and Nationair signed a letter of understanding with a view to easing the rules for long-term foreign assignments of flight crew personnel. These changes allowed for in-house staffing of jobs created as a result of a contract with Air Garuda to transport Islamic pilgrims to and from Mecca during the period of May-July 1992. A few weeks later and subsequent to the filing of a notice to bargain, Nationair decided to hire outside crew personnel in response to a late and pressing request from Air Garuda to supply an additional aircraft for the operation.

The Association submits that such a decision clearly violates the collective agreement and, by implication, the "freeze" provisions of the Code. For Nationair, the only matter at issue is that of differing interpretations regarding the contracting-out provisions of the collective agreement.

After a detailed review of the matter, the Board notes that what is before it is a request to rule on an interpretation of the collective agreement prior to concluding to a violation of the Code. In the instant case, the Board does not consider it appropriate to do so given the nature of the issue raised.

Consequently, the Board decides pursuant to section 98(3) of the Code not to determine this matter. The complaint is therefore dismissed.

Il s'agit d'une plainte de pratique déloyale déposée par l'Association des équipages de bord de Nationair Canada et alléguant violation de l'alinéa 50b) du Code canadien du travail.

En avril 1992, l'Association et Nationair ont signé une lettre d'entente visant à assouplir les règles de déploiement à l'étranger du personnel navigant prévues dans la convention collective. Ces changements permettaient de doter à l'interne les postes découlant d'un contrat conclu par Air Garuda et Nationair pour le transport de pèlerins islamiques vers La Mecque pendant la période de mai à juillet 1992. Quelques semaines plus tard et suivant le dépôt de l'avis de négocier, Nationair a décidé d'embaucher des équipages de l'extérieur pour répondre à une demande tardive et pressante d'Air Garuda d'ajouter un appareil pour compléter l'opération.

L'Association soutient que cette décision constitue une violation manifeste de la convention collective et, partant, des dispositions du Code touchant le gel des conditions de travail. Quant à Nationair, elle maintient que la seule question en cause touche l'interprétation à donner aux règles de la sous-traitance (contracting-out) de la convention collective.

Après un examen détaillé de la question, le Conseil constate que ce qu'on lui demande c'est de trancher un problème d'interprétation de la convention collective avant de conclure à une violation du Code. En l'instance, le Conseil ne croit pas opportun de se livrer à cet exercice compte tenu de la nature de la question soulevée.

En conséquence, le Conseil refuse conformément au paragraphe 98(3) du Code d'instruire la présente affaire. La plainte est donc rejetée.

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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for Decision

Nationair Canada Flight Crew
Association

complainant,

and

Nationair Canada (Nolisair
International Inc.)

respondent.

Board's File: 745-4299

The Board consisted of Ms. Louise Doyon, Vice-Chair, and Messrs. J. Jacques Alary and François Bastien, Members.

Appearances

Mr. Philip G. Hunt, accompanied by Mr. Ben Léveillé, President of Nationair Canada Flight Crew Association; and Mr. Guy Tremblay, accompanied by Mr. Jacques Moreau, Vice-President, Nationair Canada.

These reasons for decision were written by Mr. François Bastien, Member.

I

The Board has before it an unfair labour practice complaint filed pursuant to section 97(3) and alleging violation of section 50(b) of the Canada Labour Code. This complaint received by the Board on July 30, 1992 was two-fold in that it further alleged the employer had violated section 50(a) by not negotiating in good faith. Both complaints require ministerial consent as stated in section 97(3). This last part of the complaint before the Board has not received ministerial consent. As regards the complaint alleging violation of section 50(b), the Minister of Labour has authorized its filing with the Board, and counsel for Nationair Canada Flight Crew Association (the Association)

has been so advised on July 20, 1992. The Board is asked to declare that the employer has violated this provision of the Code when it hired crew personnel outside the bargaining unit for which the Association holds a certificate issued by the Board. In so doing, the employer has shown little regard for the role of the bargaining agent and the relevant provisions of the collective agreement. It is the union's position that by using personnel from an outside agency for work within the jurisdiction of the Association's members, the employer has unilaterally altered the terms and conditions of employment contrary to section 50(b). The Association therefore requests that the Board issue an order directing the employer to refrain from such a practice and to take whatever action is necessary to remedy or counteract the adverse consequences suffered by the members as a result of this alleged violation.

The Association is certified since February 24, 1988 to represent:

"all cockpit crew members - pilots and flight engineers - employed by Nationair Canada (Nolisair International Inc.), excluding vice-president operations, chief pilot, check pilots, chief flight engineer and check flight engineers."

On April 29, 1992, the Association gave Nationair notice to bargain collectively in accordance with the requirements of the Code. The collective agreement expired on June 30, 1992 and parties are currently negotiating a new one.

II

The Facts

The facts of the present case can be summarized as follows.

1. Nationair is an air carrier whose main activity is chartered flights. As of these proceedings, its fleet consisted of some 11 aircraft, i.e. 6 B747 and 5 B757. The DC-8 aircraft it previously owned were phased out in the spring of 1992, the last one being last June. It holds a single operating certificate issued by Transport Canada for all aircraft it operates, be they its own or on lease for outside contract work.
2. For the last year and a half, Nationair is under contract with Indonesia's air carrier, Air Garuda, to run a scheduled service in the Middle East. The contract duration is three months but is turned over with the resigning typically done in the days following its expiry date. According to the terms of the contract, Nationair provides Air Garuda with a 747 aircraft and is responsible for its maintenance. Cockpit personnel as well as the flight director is from Nationair while flight attendants are Air Garuda's. Air Garuda is important to Nationair from both a financial and operational standpoint. For instance, the performance of short-term contracts in the spring and the fall tends to offset Nationair's slowdown in its two main charter markets during these time periods, i.e. Europe and the Caribbean for which summer and winter are respectively the peak period.

3. Discussions took place late in the fall of 1991 between representatives of the Association and Nationair. The purpose was to determine the personnel needs of Nationair vis-à-vis its contractual obligations arising out of the HADJ 92 Operation. This operation, already carried out the previous year albeit on a smaller scale, consists in the transportation of Islamic pilgrims to and from Mecca. HADJ 92 Operation is covered by a contract between Nationair and Air Garuda. There are two phases: a) the first from May 5 to June 5, 1992 when pilgrims are flown to Mecca; b) the second from June 15 to July 16, 1992 when they are flown back. Nationair commits three 747 aircraft to the operation and advises its client that because of its own requirements for its peak period it is in no position to carry out the second phase. The use of another air carrier is suggested.
4. The January 1992 discussions between the Association and Nationair focused on the ways in which to operate the aircraft given the existing constraints imposed by the collective agreement on extended long-term voluntary foreign assignments. Article 26 capped the maximum period for such assignments at 21 days and imposed a mandatory leave upon return prior to another assignment being effected. These requirements when followed rigorously meant in practice an increase in the number of crews necessary to carry out the HADJ Operation at the very time Nationair was faced with its peak period for transatlantic chartered flights, i.e. in June and July.

5. As a result both parties favour the option of having the work performed in-house. It is against this backdrop that drafts amending the relevant provisions of the collective agreement are prepared, exchanged and discussed with a letter of understanding concerning some possible changes going to the membership for ratification in early March 1992. Following a negative vote, further discussions are held and culminate in a draft letter of understanding that will be ratified this time and signed on April 22, 1992. Article 26 of the collective agreement is consequently amended. The preamble of the letter of understanding states the difficult economic times endured by the industry and the parties' mutual effort to benefit from the HADJ Operation. The letter of understanding is effective from the date it is signed and expires on July 31, 1992.

6. In early May, Nationair is advised by Air Garuda that the air carrier it was relying on for the return phase of its HADJ Operation has called it off. As a result, it urges Nationair to provide it with one aircraft for this phase. The Association's Secretary, Mr. Vandentillaart, is advised of this development on May 10 by Nationair's Vice-President, Operations, Mr. Moreau, and discussions are held the next day with Mr. Tchoryk, Vice-President, Human Resources, also in attendance. Nationair's representatives indicate the carrier's intention to proceed with the hiring of an outside crew as it cannot accommodate in its view both the requirements of its peak season in Europe and the constraints of the collective agreement. As to the union, it claims that the hiring of outside crews clearly violates the collective agreement,

specifically Article 19. The meeting ends without resolution of the matter.

7. In the meantime, judging that time is of the essence, Nationair undertakes to arrange for the immediate contracting of a crew while it attempts to locate an appropriate aircraft. Licensing requirements for foreign personnel include a training period and simulation-assisted flights vis-à-vis Nationair's operating standards, an activity supervised by Transport Canada. Nationair selects a Texas-based company whose shares are owned exclusively by Mr. Seraj Ali, and in which Nationair according to its representatives have no capital or financial interests. A ten-member crew previously employed by PAN AM on 747 aircraft is recruited and trained by Nationair in Miami and Toronto for the start of HADJ 92 Operation of June 15, 1992.
8. On May 27, 1992, at a meeting attended by Messrs. Ben Léveillé and P. Vandentillaart, of the Association, and Jacques Moreau and Chief Pilot Yves Faucher, of Nationair, the employer confirms its decision to use personnel from Best International. A grievance already prepared by the union against that decision is also discussed, the Association's position being that these jobs should go to its laid-off personnel as per the terms of the collective agreement. The company reiterates its position that the hiring and training delays coupled with its other peak-related operational requirements make this option physically impossible. A grievance is filed by the union subsequent to the meeting. It is the view of the union that the employer failed to disclose all the information while

negotiating the letter of understanding. On the same day, the terms of contract with Best International are finalized, which contract will be signed the next day by Mr. Moreau on behalf of Nationair. Air France confirms in early June the leasing of an operating standard-ready B-747 aircraft. The aircraft is kept in Canada upon arrival. As for Best International's personnel assigned to the HADJ 92 Operation, it remains under the operational responsibility of Nationair.

III

Arguments

According to counsel for the Association, Article 1.3 lies at the core of the complainant's position that Nationair violated section 50(b) of the Code when it hired outside crews to operate flights in connection with its HADJ 92 Operation. This section grants exclusive right to flight crew members to perform work on aircraft operated by the company. Nationair is in fact asking the Board to remedy its own inadequacies in the area of staffing and training by removing from a collective agreement it has freely entered into those elements of inflexibility. For instance, the reluctance of the employer to disclose all the available information on the hiring of outside crew, and the fact that it ultimately did so within the context of these proceedings point to the employer's desire to effect significant employment changes for the Association members. This in essence is what section 50(b) is meant to guard against by granting the Board a supervisory role vis-à-vis the institution of collective bargaining when, as is

the case here, a bargaining agent is not yet in a legal strike position.

Counsel for Nationair disputes that the set of circumstances as revealed through the evidence adduced resembles anything close to those giving rise to a complaint under section 50(b). What is involved is in essence a simple business as before situation where as early as January, faced with increased personnel requirements linked to its contractual obligations and the constraints of the collective agreement with regard to foreign assignments, the employer has before it two options: use in-house personnel on the condition of important changes to the collective agreement or contract out. The first option is exercised thanks to the agreement of April 22, 1992. That a subsequent request by Air Garuda upsets the original plans only means that there exist market realities to which a business such as Nationair has to respond based on current circumstances. Further, these facts were never withheld from the Association but communicated early on. According to counsel the issue between Nationair and the Association centres on differing interpretations on the terms of the collective agreement concerning the recruitment of outside personnel, not on a violation of section 50(b). In his judgement, section 98(3) of the Code is a more appropriate avenue to address this issue. It therefore asks that it be deferred to an arbitrator.

IV

The Law

Section 50(b) states that:

"the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege."

These provisions have been the subject of a number of Board decisions; for this reason, it is neither necessary nor useful to examine them in detail here. Viewed in their generality, these decisions focus on the following principles:

1. The freeze on terms and conditions of employment imposed by section 50(b) is a dynamic, not a static, notion. The decision of a plenary session of the Board in Bank of Nova Scotia, Sherbrooke and Rock Forest (1982), 42 di 398; [1982] 2 Can LRBR 21; and 82 CLLC 16,158 (CLRB no. 367), defined the scope of the notion of a freeze by adopting the so-called "business as before" theory as opposed to the static freeze where the rights of both parties are considered to have lapsed when notice to bargain collectively is given. (See Pacific Coast Terminals Co. Ltd. and Vancouver Wharves Limited (1992), 92 CLLC 16,033 (CLRB no. 922), for a summary of the competing theories.) This means that, in practice, the activities in question can proceed as usual provided they are carried on within the limits imposed on terms and conditions of employment by the collective agreement and the sum total of existing practices.

2. Preserving the integrity of the free collective bargaining system remains the fundamental objective of this provision of the Code (Bessette Transport Inc. (1981), 43 di 64 (CLRB no. 299), pages 75-76; and Canadian Pacific Airlines Limited (1985), 57 di 153; and 85 CLLC 16,016 (CLRB no. 485), pages 174; and 14,105). The circumstances giving rise to a complaint of a contravention of this section must therefore be assessed within this framework. The general context of labour relations, the known stakes of the bargaining in progress and the conduct of the principal players are all factors the Board must weigh in assessing the evidence.
3. Whether or not anti-union animus exists is not a determining factor in section 50(b) complaints because the test in this case is an objective one (Québec Aviation Limitée (1985), 62 di 41 (CLRB no. 522), page 58). In this same decision, the Board makes clear, however, that to the extent that the applicant's evidence might establish that a change in terms and conditions of employment was motivated by anti-union animus, this same objective test would naturally be reinforced because the status quo or "business as before" theory would no longer apply. (See also on this point Byers Transport Limited (1988), 75 di 164 (CLRB no. 715).)
4. The burden of proof is on the complainant in the case of an alleged contravention of section 50(b) of the Code. The Board has had the opportunity to explain the symmetry of the "freeze" provisions in the two situations covered by the Code, i.e., first, following an application for certification and, then, following

notice to bargain, as in the present case. (See Québec Aviation Limitée, supra, page 58; and National Bank of Canada, Maniwaki, Quebec (1987), 70 di 146 (CLRb no. 637), pages 150 and 151.) It is appropriate to quote the conclusion of the latter decision, which is followed by numerous references:

"In short, the Board must be guided by whether the action taken is in keeping with past practice and whether it disguises any malicious intent, proof of which rests with the complainant..."

(page 151)

V

Decision

The question the Board has to answer in the present case is as follows: does Nationair's decision to recruit agency flight personnel for its HADJ 92 Operation constitute an altering of the terms and conditions of employment and of the rights or privileges of the employees in the bargaining unit or of the bargaining agent within the meaning of section 50(b) of the Code? Or put differently, did Nationair act within the limits of "business as before" in deciding unilaterally in May to use outside personnel instead of its own unionized personnel in accordance with the terms of the collective agreement?

Before addressing this question it is important first to explain the options open to the Board in a matter of this kind. Since this is a section 97 complaint, the Board can either hear the complaint on its merits or refer it to arbitration pursuant to section 98(3) if, in its opinion, it is a matter that could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board. In the case of a reference to

arbitration, and before it decides whether it is appropriate to do so, in particular because of the fundamental or public policy questions that cases of this kind may raise (see Canada Post Corporation (1989), 76 di 212 (CLRBR no. 729); Canada Post Corporation (1990), 81 di 28; and 12 CLRBR (2d) 117 (CLRBR no. 800); Ottawa-Carleton Regional Transit Commission (1990), 81 di 88 (CLRBR no. 805); and Québecair (1990), 82 di 190 (CLRBR no. 827), the Board must satisfy itself that certain basic conditions have in fact been met. These conditions are summarized in Maritime Employers' Association (1987), 69 di 41; and 17 CLRBR (NS) 355 (CLRBR no. 617):

- "(1) the existence of a collective agreement between the parties to the complaint filed with the Board;
- (2) the presence in the collective agreement of anti-union discrimination provisions that give the parties recourse, in such cases, to the grievance and arbitration procedure;
- (3) the universal applicability of the grievance procedure and, in particular, the possibility for the complainants to file a grievance in a given case;
- (4) the possibility of a grievance filed in a given case being referred to arbitration; and
- (5) the arbitrator's jurisdiction to grant redress.

(See also Loomis Armored Car Service Ltd. et al. (1983), 51 di 185 (CLRBR no. 408); Bank of Montreal (Devonshire Mall Branch), Windsor (1982), 51 di 160; and 83 CLLC 16,015 (CLRBR no. 404); and Canada Post Corporation (1983), 52 di 106; and 83 CLLC 16,047 (CLRBR no. 426).)"

(pages 45; and 361)

In the instant case, the Board notes that, apart from the question of whether it is appropriate to do so, the relevant conditions for a referral to arbitration are met.

Let us state clearly first that in the case of a complaint alleging a contravention of section 50(b), the Board rarely

avails itself of this option to exercise its discretion in this manner, i.e., refer the case to arbitration. A general examination of the Board decisions on this question clearly bears this out. (See in particular Pacific Coast Terminals Co. Ltd. and Vancouver Wharves Limited, *supra*; Canadian Pacific Limited (1986), 64 di 36; and 86 CLLC 16,020 (CLRB no. 554); Québec Aviation Limitée, *supra*; Air Canada (National) (1988), 72 di 169; and 88 CLLC 16,010 (CLRB no. 669); Canadian Pacific Airlines Limited, *supra*; and Bank of Nova Scotia, Sherbrooke and Rock Forest (1980), 42 di 216; [1981] 2 Can LRBR 365; and 81 CLLC 16,110 (CLRB no. 286).)

There are a number of reasons for this situation. The Board will focus on the following two. First, as stated earlier, the Code confers on the Board a unique role in preserving the free collective bargaining system. Indeed, the Board has the responsibility for protecting the rights and privileges of the parties to collective bargaining as they exist, until the open period when free collective bargaining begins. To allow this pre-existing balance and equilibrium between the parties to be broken would distort bargaining itself and, hence, industrial peace. The Board needs therefore to exercise great care when considering whether to refer this type of complaint to arbitration because such a complaint raises, almost by definition, a public policy question in that the institution of collective bargaining itself is involved.

The other reason relates to the very nature of the disputes that gave rise to the above-cited Board decisions. These feature issues which in the main extend beyond the collective agreement, either because they refer to existing practices (Pacific Coast Terminals Co. Ltd. and Vancouver

Wharves Limited, supra; Canadian Pacific Limited, supra) or because they raise problems of consistency between the agreement and these practices (Canadian Pacific Airlines Limited, supra) or because they deal with the effects of a bridging clause on the collective agreement during the freeze period (Air Canada (National), supra).

In the present case, the Board is called upon to interpret for the first time some of the terms of the collective agreement in order to determine the working conditions or practices that allegedly have been altered. The evidence and arguments were largely confined to this difference of interpretation of the collective agreement. As a rule, the Board turns down requests from the parties to interpret collective agreements, unless there are very special reasons for doing so (Canadian Pacific Airlines Limited, supra). In the present case, there are no such reasons and it is difficult for the Board to decide the matter without getting into an actual interpretation of the collective agreement. This determination lies at the heart of the present dispute and is not possible without a detailed examination of the collective agreement.

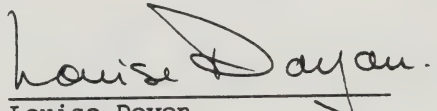
The Board does not consider it appropriate to engage in such an exercise given the nature of the question raised, and the fact that a grievance arbitrator, the proper authority to deal first with such a matter, is already seized of it.

This decision should not be construed to mean that the Board could not or ought not proceed in certain circumstances to interpret the collective agreement in order to identify the criteria against which to decide whether the action of the employer constitutes a violation

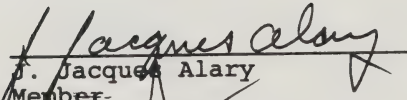
of section 50(b). Such a matter must be decided within the particular context of each case. In this instance, the Board considers that such a task is within the very purview of the arbitrator.

For all these reasons, the Board decides pursuant to section 98(3) of the Code not to determine this matter. The complaint is therefore dismissed.

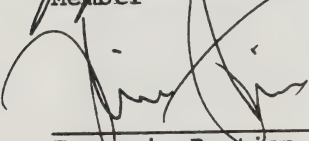
This is a unanimous decision of the Board.



Louise Doyon
Vice-Chair



J. Jacques Alary
Member



François Bastien
Member

ISSUED at Ottawa, this 26 day of November 1992.

CCRT/CLRB - 976

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Summary

BENJAMIN W. CREWDSON AND BRIAN
STEBELESKI, COMPLAINANTS,
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1541,
RESPONDENT, AND ITT FEDERAL SERVICES
CORPORATION, EMPLOYER.

Board Files: 745-4251
745-4270

Decision No.: 977

Résumé de Décision

BENJAMIN W. CREWDSON ET BRIAN
STEBELESKI, PLAIGNANTS, FRATERNITÉ
INTERNATIONALE DES OUVRIERS EN
ÉLECTRICITÉ, SECTION LOCALE 1541,
INTIMÉE, ET ITT FEDERAL SERVICES
CORPORATION, EMPLOYEUR.

Dossiers du Conseil: 745-4251
745-4270

Décision n°: 977

This is a complaint under the duty of
fair representation provisions in
section 37 of the Canada Labour Code
(Part I - Industrial Relations) where
the trade union admitted that it had
not taken into account some relevant
and vital information from the
complainants when it decided to drop
two grievances after having referred
them to arbitration.

The complaint was allowed. In its
reasons the Board briefly discusses
the dangers of accepting guilty pleas
from trade unions in these
situations. The Board went on to
find, on the basis of the submissions
before it, that the union had acted
arbitrarily when it decided to drop
the grievances.

As a remedy, the Board ordered the
union to proceed to arbitration with
the grievances and waived the time
limits in the collective agreement so
that the grievances can be heard on
their merits. The Board further
ordered the union to pay any
compensation which the arbitrator
might award to the complainants
should the grievances be successful.
The Board also gave the complainants
the option to be represented at
arbitration by counsel of their own
choosing. The union was ordered to
pay for the representation.

Il s'agit d'une plainte portant sur
le devoir de représentation juste
prévu à l'article 37 du Code canadien
du travail (Partie I - Relations du
travail). Le syndicat a reconnu ne
pas avoir tenu compte de certains
renseignements pertinents et
d'importance vitale fournis par les
plaignants lorsqu'il a décidé
d'abandonner les griefs après les
avoir renvoyés à l'arbitrage.

La plainte est accueillie. Dans ses
motifs, le Conseil examine brièvement
les dangers d'accepter des aveux de
culpabilité de la part de syndicats
dans ce genre de situations. Il juge
donc que, compte tenu des
observations présentées, le syndicat
a agi de façon arbitraire lorsque
celui-ci a décidé d'abandonner les
griefs.

À titre de redressement, le Conseil
ordonne au syndicat de renvoyer les
griefs à l'arbitrage et proroge le
délai prévu dans la convention
collective pour que les griefs
puissent être examinés au fond. En
outre, il ordonne au syndicat de
payer tout dédommagement que
l'arbitre pourrait accorder aux
plaignants, si ceux-ci ont gain de
cause. Il offre également la
possibilité aux plaignants de choisir
l'avocat qui les représentera. Par
ailleurs, il ordonne au syndicat de
payer les frais de représentation.

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**LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.**

Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Benjamin W. Crewdson and
Brian Stebeleski,

complainants,

International Brotherhood of
Electrical Workers, Local
1541,

respondent,

and

ITT Federal Services
Corporation,

employer.

Board Files: 745-4251
745-4270

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Messrs. Benjamin W. Crewdson and Brian Stebeleski, for themselves;

Mr. John R. Colley, for the respondent; and

Ms. Kristin L. Lercher, for the employer.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with two complaints under the duty of fair representation provisions contained in section 37 of the Canada Labour Code (Part I - Industrial Relations). While they were filed at separate times, both complaints arose from the same set of

circumstances which involved a decision by the International Brotherhood of Electrical Workers Local 1541 (IBEW or the union), not to proceed to arbitration with a grievance against a three-month suspension that had been imposed on Mr. Benjamin W. Crewdson and Mr. Brian Stebeleski. Messrs. Crewdson and Stebeleski (the complainants), alleged in their complaints which were filed with the Board on May 15, 1992 and June 17, 1992 respectively, that the decision to drop their grievances was arbitrary and made in bad faith, therefore, it violated section 37 of the Code, which provides:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The union denied the complaint and, following unsuccessful attempts by an Officer of the Board to assist the parties to settle the matters, a public hearing was conducted into the complaints at Winnipeg on November 23, 1992.

II

The complainants are employed by ITT Federal Services Corporation (the employer) at the Distant Early Warning Line commonly known as the DEW Line. They are part of a communications and electronics team that handles classified materials. In August, 1991 it was

discovered that certain classified material which should have been destroyed in March 1991 had not been destroyed. Following an investigation by the employer the complainants were notified in September 1991 that they were being suspended for 90 days for their alleged part in the incident. The union grieved the suspensions. In November 1991 the grievances were referred to arbitration. In March 1992 the employer gave the union access to certain classified material which it apparently relied upon to support the suspensions of the complainants. In April 1992 the union notified the complainants that it would not be proceeding with their grievances.

It was the position of the complainants that the union did not seek their version of the facts and in particular, the union did not contact them to discuss the matters raised at the March 1992 meeting with the employer before it arbitrarily dropped their grievances. As a remedy, the complainants asked the Board to order the union to proceed with their grievances to arbitration.

In its response to the complaints, the union gave no explanation of why it decided not to proceed to arbitration with the grievances other than to imply that certain information supplied by the employer caused it to doubt that the grievances could be won at arbitration. On that basis, the complaints were scheduled to be heard at Winnipeg commencing on November 23, 1992.

Prior to the hearing, the union admitted that some relevant and vital information from the complainants had not been taken into account when it made its

decision not to proceed with the grievances to arbitration. Accordingly, the union's understanding of all the facts had not been complete. The union was therefore going to take the position at the hearing that it should have proceeded to arbitrate the grievances and that it would not oppose the remedies sought by the complainants.

At the commencement of the hearing, the union confirmed the foregoing position and, at the request of the Board, gave some explanation of why it had now changed its mind about the possible success of the grievances at arbitration.

The employer, while acknowledging the Board's jurisdiction to send the grievances to arbitration if it found that the union had violated section 37 of the Code, requested that the Board take into account the prejudice suffered by the employer by the long delay if the Board were now to order the matters to be arbitrated. Counsel suggested that much of the material relied upon by the employer would in all likelihood have been destroyed and that witnesses would now have to rely on their memories. As the delay was the union's responsibility, the employer submitted that the union should bear some of the costs if the grievances were successful and the arbitrator awarded compensation.

To this, the union pointed out that this was not a discharge situation where liability would accrue until reinstatement. The 90-day suspensions here create a fixed cost which has not altered by the passage of time. The union therefore denied that the employer had been prejudiced and urged the Board to leave the

question of liability to the arbitrator should it decide to order that the grievances be arbitrated. The union added that should the Board consider any remedy other than what it had agreed to, it wanted time to make written submissions on this issue.

III

Let us say immediately that it is not the practice of this Board to accept "guilty pleas" in duty of fair representation complaints. If this were so, it would be an easy matter for trade unions to counsel members to file complaints when access to arbitration has lapsed for one reason or another. The union could then plead guilty and have the Board order the matter to arbitration. For example, many complaints to the Board rest on allegations that the bargaining agent has missed a crucial time limit in a collective agreement. If the Board were to accept guilty pleas in these situations, it would be a convenient way for trade unions to circumvent these time limits in the collective agreement. In fact, there have been instances in the past where trade unions have literally pled guilty in these situations and the Board has found that there was no violation of the Code. Examples of this can be found in Dave Mullin (1991), 84 di 74; and 91 CLLC 16,015 (CLRB no. 852); and Cathy Miller (1991), 84 di 122 (CLRB no. 854). In both cases, the bargaining agent admitted, or at least tried to admit that the missing of time limits in discharge grievances was a violation of the Code and agreed with the remedy sought which was that the Board waive the time limits and order the grievances

to be arbitrated. The Board, however, looked at the facts in each of those cases and determined in both instances that honest mistakes or at best, simple negligence had caused the time limits to be missed and refused to make a finding that the Code had been violated. In other words, there was no evidence in those cases that the conduct of the trade union involved had been arbitrary, discriminatory or in bad faith, which are prerequisites for a finding of a breach of section 37 of the Code. Without such a finding, the Board's remedial powers are of course not available.

In this case, aside from the purported guilty plea by the union, there is evidence of arbitrary conduct on the IBEW's part. It is clear from the submissions filed by the complainants, which were never really disputed by the union, that there was absolutely no attempt by the IBEW representatives to check out with them whatever it was that they supposedly learned from the employer in March 1992 that caused the union to drop the grievances. The complainants were not informed what this information consisted of, nor were they given a chance to challenge the veracity of this apparently crucial information before the union acted on the strength of it. In a situation like this, where a trade union has referred grievances to arbitration and new information comes to light which may determine whether the grievances proceed or not, it is surely incumbent upon the union representative to at least notify and to discuss such crucial new evidence with the grievors. To fail to do so and to unilaterally drop the grievances can only be described as arbitrary conduct, not to mention bad faith.

Furthermore, while it was not exactly said, it is certainly insinuated in the submissions that this new information was somehow confidential, which is hardly acceptable. Both complainants work with classified material every day and surely they have the necessary security clearances which would be required to allow them access to anything that the union was privileged to see vis-à-vis their grievances.

In the given circumstances, the Board finds that the IBEW did violate section 37 of the Code by the manner in which it arbitrarily decided to drop the grievances of the complainants.

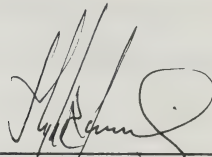
As for a remedy, about which no further submissions from the parties are required, the Board hereby invokes its powers under section 99 of the Code and orders the union to proceed to arbitration with the grievances in question. To accommodate the implementation of this remedy the Board orders that any time limits in the relevant collective agreement which may preclude these matters being arbitrated on their merit be waived.

The Board further orders that the union will be responsible for the payment of any amount of compensation that the arbitrator may find is payable to the complainants should the grievances be successful. Further, should the complainants so desire, they can be represented by counsel of their own choosing for the purposes of the arbitration. The union will pay the cost of such representation.

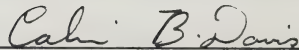
Mr. John Taggart of the Board's Regional Office at Winnipeg is appointed to assist the parties regarding

the implementation of the foregoing remedy. The Board will not issue a formal order at this time, however, jurisdiction is retained to deal further with this matter and anything arising therefrom including the issuance of such an order should the need arise.

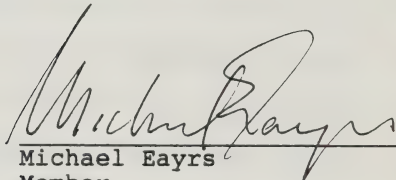
The foregoing is a unanimous decision of the Board.



Hugh F. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 30th day of November, 1992.

Information

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RÉSUMÉ

CHEMIN DE FER QUEBEC NORTH SHORE & LABRADOR, REQUÉRANTE, AINSI QUE MÉTALLURGISTES UNIS D'AMÉRIQUE, SECTIONS LOCALES 5569, 8398, 8398-02, 8399 ET 8399-01) ET TRAVAILLEURS UNIS DES TRANSPORTS SECTION LOCALE 1843, INTIMÉS.

Dossier du Conseil : 530-2019

Décision n°: 978

Il s'agit d'une demande de révision visant l'habileté à négocier collectivement de neuf unités de négociation présentée par l'employeur, Chemin de fer QNS&L, entreprise de transport ferroviaire de minéral, de marchandises et de passagers.

Le Conseil se prononce, dans un premier temps, sur une objection formulée par les Métallurgistes unis d'Amérique au sujet de la compétence du Conseil à l'égard de deux unités de négociation reconnues par le requérant. Le Conseil décide que les activités liées au chargement et au déchargement de marchandises, au mouvement des trains dans la gare et à l'entretien des voies ferrées peuvent être raisonnablement considérées comme des activités accessoires à l'exploitation d'un chemin de fer. Le Conseil conclut également que les activités de chargement et de déchargement des navires ainsi que la vérification de la qualité du minéral font partie intégrante d'une entreprise de transport, qui s'occupe de ce qu'elle transporte, du début à la fin.

Le Conseil conclut que la structure de négociation actuelle chez cet employeur n'est plus appropriée pour les raisons suivantes: l'inutile multiplicité des conventions collectives à appliquer et à négocier; la mobilité des employés d'un groupe à l'autre; et le chevauchement des tâches et des contacts opérationnels entre les groupes. Enfin, la possibilité de conflits de travail demeure bien réelle et est accentuée par l'ajout récent de deux nouvelles unités.

SUMMARY

QUEBEC NORTH SHORE & LABRADOR RAILWAY CO., APPLICANT, AND UNITED STEELWORKERS OF AMERICA (LOCALS 5569, 8398, 8398-02, 8399 AND 8399-01) AND UNITED TRANSPORTATION UNION, LOCAL 1843, RESPONDENTS.

Board File: 530-2019

Decision No.: 978

This application for review filed by the employer, Quebec North Shore & Labrador Railway Co., a company involved in the transportation of goods, minerals and passengers, concerns the appropriateness of nine bargaining units.

At the outset, the Board rendered its decision with respect to the objections that were raised by the United Steelworkers of America concerning the Board's jurisdiction over the two bargaining units voluntarily recognized by the applicant. The Board determined that the loading and unloading of goods, the movement of cars in the station and the maintenance of the railway can reasonably be considered to be activities that are accessory to the operation of a railway. In addition, the Board determined that the loading and unloading of ships and the quality control of minerals, form an integral part of a transportation business that is responsible for the goods it transports, from the beginning to the end.

The Board concluded that the current bargaining unit structure of this employer was no longer appropriate for the following reasons: the unnecessary multiplicity of collective agreements to be administered and negotiated; the transferability of employees from one group to another; the overlapping of various tasks and operational contacts between working groups. Finally, there is a very real danger of work conflict, aggravated by the recent addition of two new units.

Le Conseil conclut donc que deux unités sont appropriées: une unité générale regroupant tous les employés, à l'exclusion de ceux qui sont affectés aux équipes de trains et une unité regroupant les chefs de trains, les serre-freins et les mécaniciens de locomotive.

Le Conseil indique qu'il continue son enquête quant à la représentativité des agents négociateurs et qu'il rendra les décisions appropriées une fois l'enquête terminée.

The Board determined that two units are appropriate: one unit comprising all employees, excluding those assigned to the train crews and one unit comprising the conductors, brakemen and locomotive engineers.

The Board indicated that it is pursuing its investigation into the representative character of the bargaining agents and that it will render its decisions in this respect as soon as the investigation has been completed.

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Reasons for decision

Quebec North Shore & Labrador
Railway Co.,

applicant,

and

United Steelworkers of
America (Locals 5569, 8398,
8398-02, 8399 and 8399-01),
and United Transportation
Union, Local 1843,

respondent unions.

Board file: 530-2019

The Board was composed of Mr. J.F.W. Weatherill, Chairman,
and Ms. Ginette Gosselin and Mr. Robert Cadieux, Members.

A hearing was held in Sept-Îles, Quebec, on July 21 and 22,
August 19, 20 and 21, and September 14 and 15, 1992.

Appearances

Mr. Robert Monette and Ms. Véronique Marleau, with Mr. Jean-
Marc Blais, Vice-President, Human Resources, for the Quebec
North Shore & Labrador Railway Co.;

Mr. Gilles Grenier and Mr. J.-C. Degrasse, Regional
Co-ordinator, for the United Steelworkers of America;

Mr. Frank Luce and Mr. Berthier Arsenault, Local 1843, for
the United Transportation Union.

These reasons were written by Ms. Ginette Gosselin, Member.

I

This is an application for review under the provisions of
section 18 of the Canada Labour Code by the Quebec North
Shore & Labrador Railway Co. (QNS&L) in which it asks the
Board to review the appropriateness of the nine bargaining
units which currently cover the 665 employees working in its

operations division and to bring them together into a single unit.

The United Steelworkers of America (the Steelworkers), which represents six of these units, and the United Transportation Union (UTU), which represents the other three, contested this application. The UTU in addition presented several preliminary objections, on which a hearing has already been held and a decision rendered by the Board (Quebec North Shore & Labrador Railway Co. (1992), as yet unreported CLRB decision no. 927). For their part, the Steelworkers challenged the Board's jurisdiction with respect to two bargaining units recognized by the applicant. This objection was heard at the same time as the application, and the decision of the Board thereon is dealt with in these reasons.

QNS&L is an undertaking which engages in transporting ore, freight and passengers by train between various points in Labrador (Newfoundland) and Quebec. It is a subsidiary of the Iron Ore Company of Canada (IOC), and its operations and undertakings were declared to be a work for the general advantage of Canada when its enabling statute was enacted in May 1947. Since its establishment, which resulted from the discovery of iron deposits in the region of Schefferville, Quebec, its activities have been closely tied to those of the parent company.

QNS&L transports ore from Labrador City, Newfoundland, to Sept-Iles for IOC, but also for the Wabush Mines company. Three or four ore trains travel on the rail line over a period of 24 hours. QNS&L also transports passengers and freight between Labrador City and Sept-Iles twice a week, and between Schefferville and Sept-Iles once a week. The

frequency of passenger trains is regular, but the frequency of freight trains may vary depending on demand. The transport of passengers is subsidized by the federal government. There is no road to Schefferville, and only in the last two or three years has there been a ground route between Labrador City and Baie-Comeau, Quebec.

The main trunk of the rail line between Schefferville and Sept-Iles, which was built by QNS&L and completed in 1954, is 360 miles long. In 1960, IOC, which was starting to exploit the ore deposits in the region of Labrador City, built a trunk line about 35 miles long. This trunk connects Labrador City to the main line at the point called Ross Bay Junction, 224 miles from Sept-Iles. IOC operated this trunk itself until 1973, after which it granted the operating rights to QNS&L. Since the closing of the IOC mine in Schefferville in 1982, the traffic has been concentrated between Labrador City and Sept-Iles, and there are practically no more passenger and freight trains travelling between Ross Bay Junction and Schefferville. Moreover, work trains travel that line to do maintenance and repairs on the track. These work trains are much more frequent between Labrador City and Sept-Iles, since the traffic there is heavier and the ground more uneven. The track is maintained and traffic is controlled using the various facilities found along the track. There are also boarding camps used by the employees, shunting tracks, railway communication systems, a telephone line, a microwave receiver system, and so on.

The Sept-Iles yard is located on the harbour. The ore coming from Labrador City is unloaded and then loaded onto ships. This is also where the freight and passenger station is located, along with the repair and maintenance shops for locomotives, cars and rolling stock generally, warehouses for supplies, machinery, rails and other equipment needed for operating the railway facilities, the laboratory, the

offices and so on. Several miles of track criss-cross through the yard. Trains arriving by the main track then travel into the station to be unloaded, checked, maintained and repaired, if necessary, and parked and prepared for departure again. The facilities which were previously used for processing ore coming from Schefferville are also found here, but they have not been used since 1982. In view of the state of the world iron market, which was described to us as uncertain, to say the least, and the practically nil demand for the type of iron found in Schefferville, IOC does not contemplate resuming this operation.

The Labrador City yard is smaller, since only minor maintenance is done there. The passenger and freight station is also located there, along with the facilities necessary for processing and loading ore, a car maintenance shop, a warehouse and sufficient track for train movement.

As we have seen, the QNS&L operations division employs about 665 unionized employees divided into nine bargaining units, which are as follows.

(1) Steelworkers Local 8398 is composed of members working primarily on track maintenance (main tracks and major maintenance work in the yards), bridge and building maintenance and road maintenance with heavy machinery. The number of members varies from about 70 to 170, depending on the season. They are largely roadworkers, on-track and off-track heavy machinery drivers, on-track light machinery drivers and rail changers; there are also welders, who are electricians and labourers, to name only a few classifications. They work alone or as a crew, when work trains are set up. The Steelworkers were certified by the Board in 1975. At that time they succeeded the Brotherhood of Railway Workers which had been certified in November 1959.

(2) Steelworkers Local 8398-02 covers the employees working on communications and signalling systems maintenance and on the railway telephone lines. It has about 25 members, communications and signalling technicians and line installers. There is also a cable installer and splicer. They work largely out of the Sept-Iles station but they may have to work as members of crews aboard work trains. In April 1984 the Board certified the Steelworkers, who succeeded the Canadian Signal and Communications Union as the bargaining agent for this unit. The first certificate had been issued to the Brotherhood of Railroad Signalmen of America in 1955.

(3) Steelworkers Local 8399-01 has about 20 members. They are largely clerks and warehouse workers. They had first been represented, since 1961, by the International Association of Machinists; this unit changed frequently and is now represented by the Steelworkers which was certified by the Board in 1975.

(4) Steelworkers Local 8399 is composed of about 170 members. They are employed in car, locomotive and heavy machinery maintenance, machining parts and loading and unloading freight at the station. They are car workers, mechanical adjusters, machinists, electrical adjusters, welders, labourers, and so on. They work largely in the yards, but when necessary they work all along the main tracks. In 1975, the Board certified the Steelworkers as the bargaining agent for this unit, replacing the International Association of Machinists, which had been certified in 1956.

These last two locals have had the same president since 1985.

(5) Section 1843 of the UTU covers about 115 conductors, brakemen and engineers. They are the people who make up the crews on trains travelling on the main tracks, whether they be mineral, freight or passenger trains, or work trains. The present unit is the result of the 1978 merger of two units which had existed since 1954, of which one was certified (Brotherhood of Locomotive Engineers - BLE) and the other (UTU) had been recognized voluntarily.

(6) UTU Local 1843 covers dispatchers and crew clerks. It has about 10 members, who are responsible for coordinating rail traffic and making up train crews. They work in premises located in the Sept-Iles station. The UTU has been certified to represent this unit since 1969.

(7) UTU Local 1843 (Schedule E) covers about 20 engineers, conductors and brakemen who work in Labrador City. This unit is in a way the product of the privileges that were reserved for former IOC employees since 1972 as a result of the transfer of the operating rights for the trunk line between Labrador City and Ross Bay Junction from IOC to QNS&L. They were members of a larger Steelworkers unit, which had been certified by the competent authority in Newfoundland to represent the IOC employees in Labrador City. At first they were integrated into one of the two units then in place at QNS&L and represented by BLE or UTU, according to their job category. After these units merged in 1978, the UTU decided to bargain a separate collective agreement for this group. Its members work preparing, switching and operating trains in the Labrador City station. They also work on ore trains when they come into the Labrador City station. Finally, they enjoy acquired rights in respect of shuttles (freight and passengers) to Ross Bay Junction, that is, once or twice a week they take over passenger or freight cars which the Sept-Iles-Schefferville

train crew have left at Ross Bay Junction and bring them to Labrador City (or vice versa).

It is in respect of these last two bargaining units that the Steelworkers challenge the jurisdiction of the Board. The members of these units (5569H and 5569M) were, up to April 15, 1991, employees of IOC. On that date, IOC transferred the management of the Sept-Iles railway and shipping terminal by contract to QNS&L. The contract specifies, inter alia, that IOC retains ownership of the station, the equipment and the machinery, and that either party may terminate the contract on 90 days' notice. Since then, QNS&L has managed these employees and has applied the collective agreements entered into by IOC with the Steelworkers which apply to these employees. Their duties and the terms on which they perform them have not changed since QNS&L took over under the contract, except that they now work under the supervision of QNS&L employees. Their union representatives now deal with representatives of QNS&L with respect to the application of the collective agreements. The Steelworkers were certified by the competent authorities of the province of Quebec in respect of these two units.

(8) Steelworkers Local 5569H covers about 125 people who work at unloading, loading and storing ore and freight, loading ore aboard ships, maintaining equipment and buildings, minor maintenance on the track and roads in the Sept-Iles station, and preparing and switching trains. They are, in order of numbers, mechanics, electricians, welders, train operators (by electronic means), labourers, ore handling equipment operators, operators and drivers of various pieces of machinery or vehicles, and so on. They work only in the Sept-Iles station. This unit once had more than 1000 members. They were the ones who were employed until 1982 in the Sept-Iles ore processing plant. The termination of this

activity reduced the membership of this unit to its present size.

(9) Steelworkers Local 5569M has about 12 members who work receiving, storing and separating material used by the railway, and checking the quality of the products stored (ore or other). They are warehouse workers, technicians or warehouse clerks.

The nine collective agreements that apply to these bargaining units all expire on the same date. They contain several similar, if not identical provisions, inter alia in respect of benefits, vacation, leave and wages. In the case of wages, it must be noted, however, that the members of Local 1843ML, that is, conductors, engineers and brakemen, are still paid, as is the custom in the railway transport industry, both an hourly rate and mileage. Each collective agreement also provides for committees to be established: vacation, grievances, sub-contracts, and so on.

Most of the employees at QNS&L need training provided by the employer itself. Apart from the technicians and some tradespeople, employees start at QNS&L with no specialized training; they learn the duties of their job by performing them with the assistance of more experienced fellow workers, and they move up within their unit in the same manner.

There are separate seniority lists for each unit, but the names of several employees appear on more than one list for purposes of jobs and of job security. This situation is a result of the similarity between certain jobs, whether they are performed by the members of one unit or of another. Here we must exclude the two units made up of conductors, brakemen and locomotive engineers. They have specific duties which are only similar to the other jobs in this group. This similarity in duties also results in frequent

jurisdictional disputes between various units when a decision as to who should do a particular job must be made, as a result of which a number of grievances have arisen. Over time, it seems that each unit has established an area of jurisdiction, which frequently creates situations which are in some ways irrational, but which it defends jealously. It has not been possible to resolve these problems through bargaining, and it was apparent from the testimony given at the hearing by the representatives of these units that there is little possibility that they will one day be resolved in the present framework without causing serious conflicts.

The negotiations between QNS&L and its various bargaining units have generally been conducted simultaneously at a common bargaining table, or at different tables, depending on the year and on whether the objectives of the various bargaining units were the same. The settlements achieved most often included "me too" clauses when the negotiations took place at separate tables. There have been strikes, but they never involved all the units at the same time. They have, however, resulted in the shutdown of transport activities and the lay-off of the members of the other units.

The constitutional issue

Section 4 of the Code provides as follows:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers."

Federal works, undertakings or businesses are defined in section 2 as follows:

"'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province, ..."

This provision corresponds to one of the possible applications of section 92(10(a) of the Constitution Act, 1867.

It is not disputed in this case that QNS&L is an undertaking that falls under federal jurisdiction. Nor is it disputed that it is QNS&L which now operates the Sept-Iles railway and shipping terminal.

What the Steelworkers are disputing is the applicability of the Code to the employees who are members of Locals 5569H and 5569M who became employees of QNS&L as a result of the contract between QNS&L and IOC in April 1991. The union argued that the activities of the Sept-Iles terminal form an undertaking in itself, as defined by the Supreme Court in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, and that by reason of activities which it argued are related to the mining operations, such as loading and unloading ships, this undertaking falls under provincial jurisdiction. On this point it relied on another decision of the Supreme Court, United Transportation Union v. Central Western Railway Corp., [1990] 3 S.C.R. 1112; (1990), 76 D.L.R. (4th) 1; and 91 CLLC 14,006. In that case, the Court held that an undertaking operating a provincial railway connected to the CN system was nonetheless not a federal undertaking. On that occasion, the Supreme Court recalled that a mere change of the corporation which controls an undertaking is not necessarily a determining factor in determining the constitutional status of the undertaking; a change in the mode of

operation is a more important factor. Drawing a parallel between these two cases, it argued that since in this case the transfer from IOC to QNS&L did not result in any change in the activities carried out at the Sept-Iles terminal, the Board must follow the well-known principle clearly expressed in the decisions in Construction Montcalm Inc. v. The Minimum Wage Commission et al., [1979] 1 S.C.R. 754; and Northern Telecom Limited v. Communications Workers of Canada et al., [1980] 1 S.C.R. 115; (1979), 98 D.L.R. (3d) 1; and 79 CLLC 14,211 (Northern Telecom no. 1), which held that the provinces have exclusive jurisdiction over labour relations and that only exceptionally will Parliament be recognized as having such jurisdiction.

QNS&L then argued that the activities of the personnel in question are essentially in the nature of transport activities, and are accordingly federal; the trains must be unloaded and prepared for departure in order for the transport operations to be completed. The company added that a railway needs at least two terminals where a yard is located, where passengers can board or disembark from trains and where freight may be loaded and unloaded. Finally, QNS&L submitted that since IOC ceased processing ore in the Sept-Iles station in 1982 the activities of the terminal have undoubtedly ceased to be connected to mining operations and have become transport activities. The contract entered into by the applicant with IOC simply recognizes this change.

QNS&L argued that regardless of the method of constitutional classification used, the activities of the Sept-Iles terminal fall under federal jurisdiction. If we consider these activities as part of QNS&L's business, they can only be federal, since QNS&L is a federal undertaking. On this point, the applicant contended that unless the nature of some of the activities of an undertaking are completely

different and remote from the general objects of that undertaking, as was the case, for example, in Canadian Pacific Railway Company v. Attorney General for British Columbia et al., [1950] A.C. 122; and [1950] 1 D.L.R. 721, all the components of the federal undertaking are also federal. It drew the same conclusion in its consideration of the activities of the Sept-Iles terminal as a separate undertaking: this undertaking is then an integral part of a federal undertaking and accordingly the tests set out in Northern Telecom no. 1, supra, apply to it in their entirety.

The UTU intervened on this matter to point out that the Board's decision must deal with constitutional considerations, and not practical and operational considerations based on the interests of the parties. It argued that the question to be answered by the Board does not relate to the identity of the employer of the employees in the port of Sept-Iles, but rather relates to the nature of the duties which its employees perform.

As all the parties observed, QNS&L is an undertaking under federal jurisdiction. The company operates a railway which connects two provinces: Quebec and Newfoundland. It transports ore, freight and passengers for other parties among various points located in these two provinces. The Board believes that it is not necessary to analyze the effect of the declaration by Parliament that the works and undertakings of QNS&L are for the general advantage of Canada. The issue is whether the activities of the Sept-Iles terminal which are now under the control of QNS&L are also under federal jurisdiction.

In Canadian Air Line Employees' Association v. Wardair Canada (1975) Ltd. et al., [1979] 2 F.C. 91; (1979), 97 D.L.R. (3d) 38; and 25 N.R. 613, the Federal Court of Appeal summarized the situations in which it must be determined whether Parliament or the provincial government has jurisdiction in the field of labour relations, as follows:

"Where there is a work, undertaking or business in relation to which Parliament has legislative authority in the field of labour relations, a problem arises as to where the line is to be drawn between areas in respect of which Parliament can so legislate and other areas in respect of which labour legislation falls in the provincial domain. Certain of the cases where this type of problem arises, may be classified as follows:

(a) where an essential component of operating a federal work, undertaking or business is carried on by a person other than the principal operator thereof under some business arrangement for co-ordinating their activities;

(b) where an essential component of operating a federal work or undertaking is carried on at a location physically remote from the work or undertaking,

(c) where fringe operations, reasonably incidental to a federal work, undertaking or business are carried on by the operator thereof as an integral part of the operation thereof, even though they are not essential to its operation,

(d) where a person other than the operator of a federal work, undertaking or business carries on activities that are not essential to the operation thereof but could be carried on by the operator thereof as reasonably incidental to the operation of that work, undertaking or business.

These different classes of problem call for further comment.

With reference to Class (a), when the essentials of operating a work, undertaking or business within the federal field are carried on in part by one operator and in part by another, the employees of both fall within the federal legislation field. This can be deduced from the Stevedoring Reference to the Supreme Court of Canada.

The problem in Class (b) is like the problem in Class (a). Where part of the essentials of operating a federal work or undertaking are carried on at a place physically remote from the work or undertaking, the employees at such a remote place nevertheless fall within the federal field. This is involved in what was decided by this Court last December in the C.S.P. Foods case supra page 23.

A more difficult problem arises in connection with Classes (c) and (d). A particular activity may be reasonably incidental to the operation of a federal work, undertaking or business without being an essential component of such operation. For example, an interprovincial railway may have its own laundry facilities or its own arrangement for preparing food for passengers, or, alternatively, it may send its dirty linen to an outside laundry or buy prepared food. Generally speaking, where such an activity is carried on by the operator of the federal work, undertaking or business as an integral part thereof, it is indeed a part of the operation of the federal work, undertaking or business. Where, however, the operator of the federal work, undertaking or business carries on the operation thereof by paying ordinary local businessmen for performing such services or for supplying such commodities, the business of the person performing the service or preparing the commodities does not thereby automatically become transformed into a business subject to federal regulation. Compare the decision of the Supreme Court of Canada in the Construction Montcalm case (1979) 25 N.R. 1, that was delivered last December."

(pages 95-97; 42-43; and 616-618)

We refer the parties to the following decisions, which deal with questions of the same nature: Shamrock Television System Inc., CKOS-TV and CICC-TV (1987), 70 di 168; and 17 CLRBR (NS) 205 (CLRB no. 639); Canadian Broadcasting Corporation (Ciné Le Matou Inc.) (1987), 71 di 12 (CLRB no. 646); and Emery Worldwide (1989), 79 di 71; and 7 CLRBR (2d) 49 (CLRB no. 768) (upheld by the Federal Court of Appeal in Emery Worldwide, a CF Company v. Office and Technical Employees Union, Local 15, judgment delivered from the bench, file no. A-604-89, October 16, 1990). The rule we can take from the decisions cited above is that so long as the federal undertaking itself carries out the activities in question, it is sufficient that these activities be reasonably incidental to the principal activity in order for it to fall within federal jurisdiction as well.

The Board does not believe that in this case we should stray from this rule, which is clearly expressed in the case law. There is no doubt in this case that the activities of the Sept-Iles terminal are at the very least reasonably

incidental to the operation of a railway. It is entirely understandable for a railway business to handle loading and unloading of the freight it transports, the movement of trains in the station and the maintenance of the track in that station. The activities of loading and unloading ships and checking the quality of the ore may perhaps be considered more as incidental activities, but here they are nonetheless carried out in the context of the entire operation of a transport undertaking which looks after everything it transports, from start to finish of the transport operation.

This case may be distinguished from the situation in Central Western, supra, to which the Steelworkers Union referred on a number of occasions. In that decision, the Supreme Court analyzed the relationship between two separate undertakings, Central Western and CN. There was no question in that decision of dismembering a single federal undertaking, as is the case here. When seen from this angle, the similarity between the two cases is much smaller and it is not based on the determining factor.

For these reasons, the Board finds that the activities of the Sept-Iles terminal are an integral part of the federal undertaking QNS&L and that they should not be divided. Accordingly, the Board has jurisdiction over these activities.

The application for review

The applicant argues that the present union structure:

- does not recognize the interrelatedness of the activities of each unit;
- creates duplication in work assignments;
- artificially maintains jurisdictional borders between identical or similar job categories;

- inhibits rational use of the work-force;
- compels it to bargain and administer different collective agreements, which amounts to an intolerable effort in view of its size;
- prompts the unions to compete and raise the stakes during each bargaining period, with the applicant being the victim;
- gives each unit the power to paralyse all activities in the event of a strike; and
- reduces opportunities for transferring employees and seriously affects their job security.

It is therefore asking the Board to declare that a single unit covering all employees in its operations division is appropriate for collective bargaining. This unit would both respect the tests of community of interest and allow it to reduce its labour relations activities to a level appropriate to its size, and better carry out its role as a public carrier in a remote region.

QNS&L based its application on several decisions of the Board concerning applications for certification or review: Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661); Canadian National Railway Company (1992), as yet unreported CLRB decision no. 945; and Air Canada (1980), 42 di 114; and [1981] 2 Can LRBR 153 (CLRB no. 277). These decisions have generally indicated the Board's preference for large industrial-type units. As a model bargaining unit in a railway company of the applicant's size, the applicant suggested to the Board the unit selected for DEVCO and Compagnie minière Québec Cartier. In both those cases, a unit composed of employees employed in railway operations was declared to be appropriate for collective bargaining. The Compagnie minière Québec Cartier is a Quebec business.

As we have seen, the unions contested the application. The Steelworkers argued that the present structure:

- has never inhibited the proper conduct of the company's operations;
- does not create significant duplication or artificial partitioning since the members of the various units hold different jobs and handle different tools and equipment;
- has enabled matters that are common to the various collective agreements to be bargained jointly; and
- has not established that each unit could paralyse all activities in the event of a strike.

They argued that the interrelatedness of the jobs is not a test for uniting the units and asked the Board to dismiss the application. While recognizing that some problems exist, they recalled that both job categories and union structure may engender conflict in assigning work and that problems of this nature may always arise regardless of the number of bargaining units in a business. Finally, the Steelworkers argued that while the Board has often expressed its reluctance to establish multiple bargaining units in a business, it has nonetheless always taken into account the facts unique to each case in deciding the issue.

The UTU then argued that the present structure:

- complies with the community of interest test;
- has allowed for collective agreements covering conductors, engineers and brakemen to be negotiated which take into account their specific problems;
- has made it possible to establish a more harmonious relationship between the members of Schedule E and their employer; and
- has made it possible for problems to be resolved, which would not have been possible if a unit had been larger.

They are asking the Board not to intervene. They argued that QNS&L's sole objective is to short-circuit the bargaining process since there is no valid reason in terms of labour relations for changing the present structure. The UTU noted that there are industry bargaining unit models and that the model to be followed here is the railway industry model, in which it has always been recognized that train

crews form a separate unit. They also noted that the Board's preference for industrial-type units is not an absolute test, and on this point referred to the decision of the Board in AirBC Limited (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797). If, however, the Board finds that the units should be changed, they suggested that a unit covering the three groups represented by the UTU would be appropriate for collective bargaining. The union has always been able to understand and deal with the specific problems of the employees it represents in this case, and these three groups demonstrate sufficient community of interest to be covered by a single unit.

Against this last proposition, QNS&L argued that the unit thus created was artificial. It noted that the crew clerks and dispatchers have the same community of interest with the train crews as the other employees in the business and that there is nothing on which they can be distinguished. The union allegiance they have in common is not a factor in determining an appropriate unit for collective bargaining.

The Board's power of review is set out in section 18 of the Code:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

The applicant is asking us in this case to review the certification orders issued by the Board over the years with respect to various groups of employees of QNS&L. Incidentally, the Board may also alter the units established by the parties (on this point, see Board decision 927).

The Code gives the Board the power to determine the unit appropriate for collective bargaining:

"27.(1) Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.

(2) In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union."

* * * * *

"16. The Board has, in relation to any proceeding before it, power

...

(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the foregoing, any question as to whether

...

(v) a group of employees is a unit appropriate for collective bargaining; ..."

The tests for determining whether a unit is appropriate for collective bargaining take into account the interests of both the employees and their employer. Without claiming to make an exhaustive list of these factors, we would note, inter alia, the community of interest among the employees, the method of organization and administration of the business, the history of collective bargaining with the employer and in the industry in question, whether the employees are interchangeable and the interests of industrial peace. The tests may have different weight, depending on the individual case, particularly in terms of whether it is an application for certification or an application for review. In the first situation, the Board must allow the employees to have access to collective bargaining. In the second, it must examine the existing bargaining structure in order to make the bargaining process and the application of the collective agreements more effective. However, it must always try to balance what are often divergent interests in

determining viable bargaining units and in order to ensure effective bargaining and the most harmonious labour relations possible.

As much as possible in both cases, taking into account the tests referred to above, of course, the Board will prefer large units rather than multiple small units. In Canadian National Railway Company, *supra*, it listed the factors militating in favour of establishing large units, which are generally applicable in either case:

"While there is no specific presumption in favour of all-employee (or even 'all craft employee') bargaining units (see Alberta Government Telephones Commission (1989), 76 di 172 (CLRB no. 726), pages 182-183), the Board has long favoured the larger, more comprehensive unit. In Canadian Pacific Limited (1976), 13 di 13; [1976] 1 Can LRBR 361; and 76 CLLC 16,018 (CLRB no. 59), the Board adopted an analysis of the relevant factors set out in the decision of the British Columbia Labour Relations Board in Insurance Corporation of British Columbia, [1974] 1 Can LRBR 403 (B.C.-), pages 408-411. The factors there considered included the following:

- administration efficiency and convenience in bargaining;
- enhancement of lateral mobility of employees;
- facilitation of a common framework of employment conditions;
- increased industrial stability.

The importance of these factors was confirmed and additional related factors were discussed in the recent Canada Post Corporation case (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675), the additional factors including the following:

- overlap in the work performed by members of different bargaining units;
- common supervisory responsibility;
- operational contact between members of the various units;
- similarity of collective agreement provisions;
- the existence of work jurisdiction disputes."

(pages 14-15)

Various factors may, however, justify creating or maintaining small units. These may include the existence of legislative provisions such as those in sections 27(4), (5) and (6) of the Code concerning professionals, supervisors

and private constables, the divergent interests or absence of any community of interest among the groups of employees of a single business, or even geographic factors.

All of these factors together form the backdrop for our decisions. Applying them to the facts of this case leads us to conclude that the bargaining structure for this employer is not appropriate.

Thus it appears to us that the present structure is very awkward, both for the bargaining agents and for the employer. It pointlessly increases bargaining, since most of the collective agreements contain terms that are very often identical, although sometimes expressed differently, and everyone knows quite well that unless there is very good reason, these terms will remain identical after each bargaining round. The same is true for the administration of these collective agreements; similar provisions can only lead to a single interpretation and a single application, even though they appear in different collective agreements. Similarly, the interchangeability of the employees and therefore the opportunities for transfer from one group to another are obvious, and are confirmed by the fact that employees are registered on more than one seniority list. They are also confirmed by the fact that there are jurisdictional disputes among the various units. Such conflicts would not occur if the duties connected with each unit were so different and specialized that only the members could perform them. It is also apparent from the evidence that the duties of the employees of the operations division of QNS&L overlap and that there is frequent operational contact among the various groups since their activities are carried out at some step or other, or at several steps, in the activity of transport. Finally, while the possibility of labour disputes has not materialized very often, it is

nonetheless real and is accentuated by the recent addition of two new units.

To this is added the fact that the present bargaining units were, for the most part, established during the 1950s under the provisions of the Industrial Relations and Disputes Investigation Act, S.C. 1948, c. 54, and that even though the Board certified the Steelworkers and the UTU on several occasions thereafter to represent them, it did not really, however, rule on their appropriateness for collective bargaining. Each certification granted by the Board came as a result of a raid, and its policy on such occasions is not so much to verify the appropriateness of the unit in question for collective bargaining as to allow the employees to choose their bargaining agent (on this point, see CJMS Radio Montréal (Québec) Limitée (1978), 33 di 393; and [1980] 1 Can LRBR 270 (CLRB no. 151). As a result of the transfers that have occurred between IOC and QNS&L, three bargaining units, which were established by the Quebec and Newfoundland authorities, have been added to those created under the federal legislation. The Board therefore believes that it is faced with the type of situation contemplated in Teleglobes Canada (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198), when it examined the issue of whether the nature of bargaining certificates is static or evolving:

"In this regard, the Board's remarks in Canadian National Railway, supra,

'Whenever an order or decision of the Board has a continuing effect, and this is typically the case where a Certification Order has been issued, various circumstances may change which may require corresponding amendments or clarifications of the Board's original decision.'
(p. 25)

seem cogent. And when in the British Columbia Telephone Company, 22 di 507 case the Board says:

'Of course, a bargaining relationship need not for that reason remain forever static.'
(p. 521)

we would like to add that the union's position may not stay congealed nor that of the employer. In the one case, as well as in the other, it may happen that it becomes imperative, in order to maintain orderly labour relations, that the parties have rapid and ready access to a procedure for revising bargaining units."

(pages 302-303; and 113-114)

Accordingly, we are going to change the bargaining units at QNS&L.

Based on our analysis of the facts in the case, the tests and factors for determining a unit appropriate for collective bargaining and the arguments of the parties, we conclude that two units are appropriate: one general unit covering all employees, excluding employees working on train crews, and one unit covering the train crew employees, that is, conductors, brakemen and locomotive engineers.

This choice, rather than the single unit sought by the employer and often favoured in the case law, is based largely on three tests: the history of bargaining in the railway industry, the employees' community of interest and the interchangeability of the employees. The history of collective bargaining in the railway industry normally allows for recognition of several distinct groups of employees. In large undertakings, we find a group comprised of employees who work on track maintenance, a group comprised of employees who work in communications and signalling, and a group comprised of employees who make up train crews, to name only a few. However, in this case, and for the same reasons for which we decided that a change was required, only the group made up of conductors, brakemen and locomotive engineers retains this distinct character. Their community of interest is not in doubt, even though some work only out of Labrador City while the others work out of Sept-Îles; in fact, this is practically their only difference,

and it does not justify maintaining two units for this one group. Their duties are obviously interchangeable, but only among themselves, and in fact this happens regularly when some of them take over trains which the others have driven to a certain point. The specific nature of their duties, added to the fact that together they form a group of about 125 people, justifies making them a distinct group. There is a viable unit here, capable of genuinely bargaining with the employer. The Board does not accept the suggestion of the UTU that the dispatchers and crew clerks be added to this unit. They do not have the same specificity of duties unique to conductors, brakemen and locomotive engineers, and their interests are better served within a larger unit.

The other unit will have 500 members, more or less, depending on the season. As we stated earlier, in a larger undertaking the Board could have recognized more than one appropriate unit for bargaining among this group of employees. In this case, however, we conclude that a single unit is appropriate. The interchangeability and overlap of duties currently reserved to one unit or another, which are apparent in making up work trains, or yard maintenance work, or in the fact that the same job titles are found in more than one collective agreement, for example, are one of the main reasons for our decision.

This decision is also based, as we noted earlier, on a concern for balancing the interests of the parties. Starting with the undertaking, factors which the Board considers to be decisive are as follows: QNS&L is a small undertaking; there is no discontinuity in the manner in which its activities are carried out, in locations which are clearly quite close together; and there is little diversification in these activities, transporting ore being by far the most important, and the actual reason it exists. In terms of the employees, the Board considers the following

factors to be decisive: an increase in the pool of jobs available to them for purposes of job security, transfer and promotion; learning new duties without losing rights; a more stable work place; and uniting the currently scattered financial and human resources of their unions.

In view of the foregoing, the Board decides that the following units are appropriate for collective bargaining:

Unit no. 1:

"all employees in the operations division of Q.N.S. & L. with the exception of conductors, brakemen, locomotive engineers, supervisors and employees above that level."

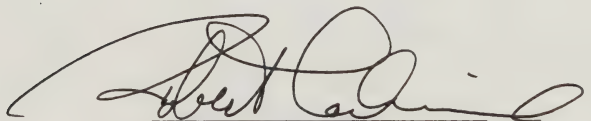
Unit no. 2:

"all conductors, brakemen and locomotive engineers employed by QNS&L."

This decision is an interim decision within the meaning of section 20(1) of the Code. The Board is continuing its investigation into the representative character of the bargaining agents and it will make the appropriate decisions once its investigation has been completed.


J.F.W. Weatherill
Chairman


Ginette Gosselin
Member


Robert Cadieux
Member

ISSUED at Ottawa, this 8th day of December 1992

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Summary

STEVE KASPER, COMPLAINANT, CANADIAN NATIONAL RAILWAY COMPANY, EMPLOYER/RESPONDENT, AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, BARGAINING AGENT/INTERESTED PARTY.

Board File: 950-195

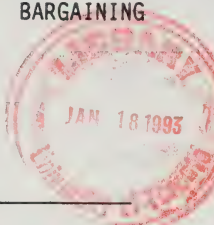
Decision No.: 979

Résumé de Décision

STEVE KASPER, PLAIGNANT, COMPAGNIE DES CHEMINS DE FER NATIONAUX DU CANADA, EMPLOYEUR INTIMÉ, ET ASSOCIATION UNIE DES COMPAGNONS ET DES APPRENTIS DE L'INDUSTRIE, DE LA PLOMBERIE ET DE LA TUYAUTERIE DES ÉTATS-UNIS ET DU CANADA, AGENT NÉGOCIATEUR ET PARTIE INTÉRESSÉE.

Dossier du Conseil: 950-195

Décision n°: 979



These reasons deal with a complaint under the safety and health provisions in Part II of the Canada Labour Code (Occupational Safety and Health). The allegations were that the employer disciplined and then discharged an employee because he had exercised certain rights under the Code.

The complaint was dismissed. In its reasons the Board reaffirms its policy that the focus in this type of complaint is on the employer's motives for having taken action against an employee rather than on the reasonableness of the employee's refusal. The Board also touches on the restrictions on the Board's jurisdiction under section 133(1) of the Code which limits the Board to dealing with complaints arising from an employee having exercised the right to refuse under sections 128 or 129 of the Code. The Board's policy of "proximate cause" is also discussed briefly.

In the particular circumstances of this case, the Board found that the pattern of discipline taken against the employee and the discharge were not related to the exercise of rights under Part II of the Code.

Les présents motifs traitent d'une plainte déposée en vertu de la Partie II du Code canadien du travail, Sécurité et santé au travail. Le plaignant soutient que l'employeur a pris à son égard des mesures disciplinaires et qu'il l'a congédié parce qu'il avait exercé certains droits en vertu du Code.

La plainte est rejetée. Dans ses motifs, le Conseil réaffirme que dans ce genre de plainte, il s'agit de déterminer ce qui a motivé l'employeur à prendre des mesures à l'égard d'un employé et non de se prononcer sur le caractère raisonnable du refus de travailler. Le Conseil aborde également le fait qu'aux termes du paragraphe 133(1) du Code, sa compétence se limite aux plaintes qui font suite à un refus exercé en conformité des articles 128 ou 129 du Code. Le Conseil discute aussi brièvement de la question de la cause immédiate.

Dans ce cas, le Conseil en arrive à la conclusion que ni les mesures disciplinaires prises à l'égard de l'employé ni le congédiement n'étaient reliés au fait que l'employé avait exercé ses droits en vertu de la Partie II du Code.

(CN Rail or the employer) violated section 147(a) of the Code by terminating his employment because he exercised his right to refuse to work on the grounds that danger, in the form of asbestos, existed in the workplace. Mr. Kasper also claimed that the employer's unlawful actions against him were retaliation because he had complained about the dangerous levels of asbestos in the workplace to Labour Canada.

CN Rail denied the allegations and, following unsuccessful attempts by an Officer of the Board to assist the parties to settle the matter the complaint was heard by the Board at Toronto on October 20 and 21, 1992 and November 17, 18 and 19, 1992.

The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the union) was involved in these proceedings as an interested party only. Mr. Kasper chose not to be represented by the union that is the exclusive bargaining agent for the bargaining unit in which he is included for collective bargaining purposes. Mr. Kasper was represented by counsel of his own choosing.

It should also be mentioned that while this complaint was filed with the Board on April 25, 1991, it was not activated until June 26, 1991 until certain pertinent information was supplied by Mr. Kasper. The matter was further delayed by Mr. Kasper's frequent change of counsel and the exchange of a plethora of information between the parties. In light of this, the Board Officer's report to the Board was not completed until June 11, 1992.

II

Mr. Kasper was employed by CN Rail as an apprentice pipefitter, then as a journeyman pipefitter from February 1978 until he was dismissed on April 18, 1991. His discharge came after he accumulated 105 demerit points over a six-month period for alleged infractions that included poor timekeeping, unauthorized breaks, unauthorized leave of absence and for being involved in an altercation with another employee.

According to Mr. Kasper, this pattern of discipline that was imposed on him during a six-month period which extended from October 1990 to April 1991 was a deliberate and systematic scheme embarked upon by the employer to terminate his employment because he had exercised certain rights under Part II of the Code in October 1990.

Mr. Kasper pointed out that the first of these demerit points were assessed immediately after he had complained to Labour Canada about what he considered to be dangerous levels of asbestos at the maintenance facilities at MacMillan Yard where he worked. What sparked this complaint was an incident at work on October 16, 1990 when Mr. Kasper had apparently identified a piece of asbestos rope as a potential source of danger. In the ensuing exchange between he and a supervisor Mr. Kasper alleged that the supervisor waved the asbestos rope in his face asking how this could hurt him. Although the employer flatly denies that this ever took place, Mr. Kasper claims it did occur and that he was so infuriated he contacted Labour Canada.

Mr. Kasper's complaint to Labour Canada resulted in an impromptu inspection of CN Rail's maintenance facilities at MacMillan yard on October 22, 1990 by two safety officers. During this inspection Mr. Kasper led the way pointing out the supposed danger areas to the safety officers. This naturally left no doubt in the employer's mind about who had instigated this action by Labour Canada.

The end result of the inspection was the issuance of what is known as a voluntary compliance notice to CN Rail by the safety officers regarding some exposed and potentially dangerous asbestos insulation on piping in the boiler room and fan room areas.

In addition to the complaint to Labour Canada which we have just described, Mr. Kasper also complained that the employer's disciplinary action against him was influenced by the exercise of his right to refuse to work under section 128(1) of the Code:

"128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

Mr. Kasper's alleged refusal to work took place on October 24, 1990 just two days after the Labour Canada inspection at MacMillan Yard and the issuance of the voluntary compliance notice by Labour Canada.

On that day Mr. Kasper was supposed to start work at 8:00 o'clock in the morning, however, he did not show up until about 3:00 o'clock in the afternoon when he appeared in his supervisor's office to declare that he was refusing to work under section 128 of Part II of the Code. When pressed to be specific about the danger that caused his refusal, Mr. Kasper only repeated the section number of the Code several times. After further questioning, he did eventually mutter something about asbestos being all over the place. He then left at 4:00 p.m. when his shift would have ended without giving any further explanation.

The employer, having just completed the repairs to the defective asbestos piping insulation that very day in compliance with the Labour Canada notice, took Mr. Kasper's allegations literally and had tests done for airborne asbestos fibres. These tests were done after consultation with Labour Canada who was notified about Mr. Kasper's refusal. The tests turned out to be negative in that any levels of asbestos that were detected were below the specified tolerance levels. CN Rail also took the precaution to notify other employees in the maintenance department of Mr. Kasper's refusal as well as the results of the tests.

In the meantime, Mr. Kasper reported for work at his regular time on the morning of October 25, 1990. According to the submissions made by counsel on Mr. Kasper's behalf at the hearing, his refusal had ceased and he was showing up for his regular shift. The employer, however, not having been informed of this at the time, re-assigned Mr. Kasper to do outside work until the tests were completed. A short while later, the employer also took steps to ensure that

Mr. Kasper, along with other employees as well as supervisors from the maintenance department, attended a course on asbestos handling.

That generally describes the circumstances surrounding what Mr. Kasper sees as the exercise of his rights under Part II of the Code; however, there is one other incident that Mr. Kasper raised in support of his contention that CN Rail was acting in retaliation to him "blowing the whistle" about the dangers of asbestos at MacMillan Yard. This involved a letter from the employer dated October 18, 1990 to Mr. Kasper informing him that effective that date he was disqualified from his position. This letter read:

"With your acknowledgement that you do not have the qualifications or the training to handle asbestos, and with knowledge of the type of work that you are presently assigned to in the maintenance of this plant it is obvious that you cannot safely perform the tasks as required in the routine performance of your duties. You are therefore disqualified from your present position as pipefitter in the maintenance department.

You will be required to exercise your seniority in accordance with wage agreement 12.31 to position to which you are capable of performing outside of the facility maintenance department. You will be required to report to the 04 work center on Sunday October 21, 1990. Your intentions must be made known to me by 0900 hours October 22, 1990."

Mr. Kasper claimed that this letter came unexpectedly after the asbestos rope incident. It was implied that this "disqualification" was yet another example of the employer disciplining Mr. Kasper because he was exercising his rights under Part II of the Code. Through the evidence of Mr. R. Montgomery, Equipment Officer at MacMillan Yard, who was Mr. Kasper's supervisor, it was submitted that this arrangement to

move Mr. Kasper to another job away from possible exposure to asbestos was implemented following discussions with him. According to Mr. Montgomery, Mr. Kasper had acquiesced to the possibility of a move but when he saw the word "disqualified" in the letter he balked. Mr. Kasper then showed the letter to Labour Canada safety officers implying that he was being disciplined. Mr. Montgomery went on to explain that under the collective agreement that governs Mr. Kasper's terms of employment, the only way to move him to another position was to invoke the "disqualification" clause which then allowed Mr. Kasper to invoke his seniority rights to bump into another position. The employer was adamant that its motives were not retaliatory nor disciplinary; in fact, Mr. Montgomery swore that he was not aware of Mr. Kasper's complaint to Labour Canada when the letter was drafted and given to Mr. Kasper. Once Labour Canada safety officers had pointed out to Mr. Montgomery on October 22, 1990 that this letter could be construed as disciplinary, it was immediately withdrawn.

III

Turning now to the incidents that resulted in the assessment of 105 demerit points against Mr. Kasper, it is our intention to capsulize this evidence to illustrate the sequence of events and what was basically involved. In so doing, however, we would remind the parties, as we did many times during the hearing, that the Board does not sit in judgement of the employer's actions vis-à-vis just cause, nor do we assess the appropriateness of the penalties imposed.

Those questions properly lie within the domain of the arbitration process under the collective agreement. The Board's only role in this type of complaint is to ensure that the employer's conduct was unrelated to the exercise of Mr. Kasper's rights under Part II of the Code.

With that in mind, the following reflects the relevant facts relating to the pattern of discipline.

In September 1990, Mr. Kasper's timekeeping had become a concern for the employer. On two occasions during that month he was called in and spoken to about it. On October 16, 1990, Mr. Kasper was allegedly found sleeping in the soap room. A disciplinary investigation into this incident was scheduled for October 23, 1990 following which Mr. Kasper was assessed 15 demerit points. Coincidentally, October 23, 1990 was the day after the Labour Canada inspection at MacMillan Yard and Mr. Kasper made much of this timing in his efforts to link the discipline with his "whistle blowing". However, according to the testimony of Mr. Montgomery who arranged and conducted the investigation, it had been scheduled prior to the employer's knowledge of Mr. Kasper's involvement with Labour Canada. This was supported by documentary evidence.

The next disciplinary investigation involving Mr. Kasper took place on November 21, 1990. According to the employer, his timekeeping deteriorated steadily notwithstanding the verbal cautions in September. Documents placed before the Board showed at least six incidents of late arrivals in October and no less than eleven days absenteeism during October and November up

to the time of the interview. On some of the days absent, Mr. Kasper had apparently not even called in.

As a result of this investigation, Mr. Kasper was assessed a further 15 demerit points. This brought his total to 30 points.

The next incident involved two days absence without leave on December 30 and 31, 1990. Having sought leave on those days and having been refused, Mr. Kasper did not protect his assignment, he simply did not show up for work. To make matters worse, this was apparently the third time that he had done this at precisely the same time of the year. In 1987 and again in 1989, he had gone A.W.O.L. using the same excuse that he used this time which involved a sick uncle in the States.

A disciplinary interview was conducted on January 21, 1991 into this unauthorized absence and Mr. Kasper was assessed 20 demerit points. This brought his total to 50 points.

In February 1991, Mr. Kasper was interviewed by the employer and reminded that his demerit point mark was dangerously high and that his job could be in jeopardy. This type of interview is apparently a normal aspect of the employer's corrective disciplinary policy. Employees who have accumulated 50 demerit points are called in and spoken to about what is expected of them. They are cautioned that they will be under close supervision and they are also reminded that if there are no further incidents which require discipline during the following year 20 demerit points will be removed from their records.

The practice is that 20 demerit points are removed for each year of good behaviour.

According to the evidence presented by the employer, Mr. Kasper did not heed this warning. His timekeeping was still shoddy and he became involved in at least two other incidents that required discipline. These involved an altercation with another employee and two unauthorized breaks from work. The unauthorized breaks occurred in March 1991 when Mr. Kasper was found reading in the carpenter shop. He was cautioned about this behaviour and was told that the carpenter shop was out of bounds. The very next day he was found there again reading when he was supposed to be working. Investigations into these alleged infractions and the altercation caused Mr. Kasper's demerit level to soar to 105 and he was dismissed.

IV

The only issue before us is whether the discipline that led to Mr. Kasper's discharge was in any way related to the exercise of his rights under section 128 of the Code. The question of whether or not danger actually existed at MacMillan Yard is not before us and, as we have already indicated, we are not about to decide whether CN Rail had just cause to treat Mr. Kasper as it did. For the purposes of this limited role, we need only refer to a few cases to set out the Board's policies and practices in this type of complaint. These are: William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRBR no. 332); David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRBR no. 686); Roland Sabourin (1987), 69 di 61 (CLRBR no.

618); John Charters et al. (1989), 76 di 188; and 3 CLRBR (2d) 253 (CLRB no. 727); and David R. Holloway (1990), 83 di 50; and 14 CLRBR (2d) 293 (CLRB no. 835).

What can be drawn from those cases is that the main focus in these situations is on the motives for the employer having taken action against an employee who has exercised the right to refuse under section 128(1) rather than on the reasonableness of the employee's refusal. In the interests of attaining the purposes of Part II which is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment (section 122.1), the Board has long since decided to give the broadest interpretation possible to the words "has reasonable cause to believe" in section 128(1). In practice, refusing employees need only satisfy the Board that their refusal was motivated by genuine safety concerns to receive the full protection offered by section 147 of the Code:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; or

(b) fail or neglect to provide

(i) a safety and health committee with any information requested by it pursuant to paragraph 135(6)(j), or

(ii) a safety and health representative with any information requested by the representative pursuant to paragraph 136(4)(e)."

The Board can of course only deal with matters under section 147 that fall within its jurisdiction which is restricted to complaints arising from employer retaliation against employees who have acted in accordance with section 128 or 129 of the Code. This is clearly spelled out in section 133(1) of the Code:

"133. (1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention."

(emphasis added)

We mention this because there seemed to be a misunderstanding in these proceedings that the Board can somehow remedy employer actions against employees for safety related conduct other than the exercise of the right to refuse, i.e., "whistle blowing". This is of course not so. (See Lila K. Walker et al. (1988), 73 di 126 (CLRB no. 678) where the Board dealt with this limitation on its jurisdiction).

Returning to the Board's policies and practices, it is trite to say that the burden lies with employers in

these complaints to satisfy the Board that any discipline or other prohibited action against employees was totally unrelated to the exercise of their right to refuse to work (Section 133(6)). In this regard, the Board has adopted its "proximate cause" policy which is an integral part of its approach to unfair labour practice complaints under Part I of the Code and applies these policies to complaints under Part II (See Roland Sabourin, supra). This effectively means that employers will be found to have violated the Code even if the exercise of rights under Part II are found to be only a proximate cause for employer actions.

V

Before dealing with the merit of the complaint, there are a couple of procedural matters that have to be covered. One arises from a ruling made by the Board during the hearing when we refused to accept evidence of conversations which Mr. Kasper claimed to have recorded. We promised reasons on this issue. The other goes to whether Mr. Kasper did in fact refuse to work within the meaning of section 128(1) of the Code on October 24, 1990. This issue was raised by the employer.

Starting with the ruling about the evidence of the recorded conversations, which we do not intend to spend much time on, this came up on the third day of the hearing after the employer's case was in. During the testimony of Mr. Kasper, his counsel attempted to put before us copies of what were purported to be partial transcripts of taped

conversations with both management and union officials. The actual recordings were said to have been done without the knowledge of the other participants during the disciplinary investigations referred to earlier as well as at other times throughout the process. The transcripts were described as being in Mr. Kasper's own handwriting. They were said to be incomplete with many parts of the alleged conversations being "inaudible". The existence of the transcripts, the tape recordings or their contents had never been brought to the attention of the parties at any time during the lengthy period of time that this complaint has been before the Board. Nor was the Board's Officer notified of their existence during the investigation stages of the proceedings or, to our knowledge, during the attempts to arrive at a settlement of the matter. Furthermore, during cross-examination of the employer's witnesses, counsel for Mr. Kasper made no reference to the possible existence of these transcripts or tape recordings which may have contained evidence contrary to what had been sworn to.

In those circumstances, without dealing with the broader question of admissibility or the other problems surrounding the need for proof of authenticity of such evidence, the Board declined to accept the evidence offered on the grounds of fairness. Clearly, to allow Mr. Kasper to present material of this nature at this late stage in the proceedings would have been totally unfair to the employer, particularly when we knew that he had the tapes in his possession all along.

Moreover, Mr. Kasper had an obligation under the Board's Regulations to produce, at the time he filed his complaint, all of the facts and circumstances upon which he relied. Compliance with this rule is crucial to the Board's procedures as we are first and foremost a labour relations forum where resolution of labour relations problems are a primary consideration. If parties are allowed to hold back crucial evidence until the last minute, it is not only unfair to the other parties in a procedural sense, it also diminishes the opportunity for the Board's officers to settle the matter. If both parties to a complaint are fully aware of everything involved early in the process, there is more likelihood of a settlement. Settlements, which are an integral part of the Board's processes, not only avoid the high cost of litigation, they also allow the parties to resolve their disputes in a manner that is mutually acceptable to them which, in turn, goes a long way to enhancing their relationship. In our respectful opinion, this is the preferable way to dispose of complaints that come before the Board.

In this particular case, if Mr. Kasper had damning evidence against the employer by way of the recording of the investigations or elsewhere, which seems unlikely in light of the overall evidence and the submissions about what the supposed transcripts contained, it should have been produced long before the hearing.

Turning now to the question of whether Mr. Kasper's refusal to work on October 24, 1990 was in strict compliance with Part II and in particular with section 133(3) of the Code, this section provides:

"133. (3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint."
(emphasis added)

Section 128(6) referred to in section 133(3) goes to the requirement that a refusing employee report the specific reasons for the refusal to the employer as well as to a member of the safety and health committee or, where no such committee has been established, to the safety and health representative.

Section 129(1) which is also referred to in section 133(3) requires a refusing employee and the employer to notify a safety officer of the circumstances where the employee continues to refuse following the required initial investigation by the employer or, of course, a failure by an employer to conduct the required investigation. These are mandatory steps which have to be taken prior to filing a complaint with the Board and there clearly has to be some semblance of compliance with these prerequisites before the Board has jurisdiction to deal with a complaint.

In the past, the Board has said that it will not be overly technical or restrictive when assessing whether sections 128(6) or 129(1) have been complied with. Provided that the basics have taken place, i.e., there has been a refusal, the reasons for which could be identified as concerns about the existence of danger and, a safety officer has been notified where

applicable, the Board said it would be flexible about the sequence of these events and about who notified whom (see William Gallivan, supra).

Here, in keeping with that past practice, Mr. Kasper is getting the benefit of the doubt as we hesitantly find that he did just barely enough to qualify to file his complaint. We do so, notwithstanding our suspicions that his refusal on October 24, 1990 was no more than an exercise to shield himself with the protection offered by Part II of the Code after he had been told by Labour Canada that the Board's jurisdiction did not extend to "whistle blowing". This was borne out by Mr. Kasper's attitude while testifying about his refusal. He was clearly of the opinion that all he had to do was show up for work and utter the magic words about invoking section 128 of Part II and he would somehow be immune from discipline.

Be that as it may, we are prepared to accept that in the particular circumstances of this case, there was a refusal and that the refusal was motivated by Mr. Kasper's genuine, if not misplaced obsession about the dangers of exposure to asbestos. Certainly, there can be little doubt that when he walked into Mr. Montgomery's office close to the end of his shift on October 24, 1990 and made his declaration that he was refusing to work under Part II of the Code, the employer knew what was happening. The procedures under section 128 were clearly being triggered. If there was any doubt in the employer's mind, it could only have been (and rightfully so) about the specific danger to which Mr. Kasper was referring. That became clearer, at least to the point of acceptability, when

he referred to asbestos being all over the place. It was certainly accepted by the employer who initiated tests for airborne asbestos fibres.

What happened after the reference to asbestos is quite vague; however, for the purposes of section 133(3) we are prepared to accept the submissions of Mr. Kasper's counsel that the refusal was over when he left Mr. Montgomery's office at 4:00 p.m. Consequently, if Mr. Kasper was not continuing with his refusal, there was no need for a safety officer to be notified pursuant to section 129(1). To get to this point though, we must also assume that Mr. Kasper had accepted the employer's response to his refusal and that he was no longer concerned about danger from asbestos in the workplace when he walked out of Mr. Montgomery's office at 4:00 p.m. on October 24, 1990. To accept anything less would disqualify Mr. Kasper from complaining under section 133(3) of the Code.

VI

Looking at this complaint within the framework of the Board's policies and practices regarding complaints of this nature, we are satisfied that the discipline meted out to Mr. Kasper was not in any way related to the exercise of his right to refuse to work under Part II of the Code. While it is true that the commencement of the pattern of discipline did coincide with Mr. Kasper's high profile complaints to Labour Canada in October 1990, as well as with his refusal under section 128(1) on October 24, 1990, we are convinced on the evidence before us that the two were unrelated. In fact, if one looks closely at the sequence of events that took place at that time, the

discipline actually commenced first. It did not commence as Mr. Kasper suggests, after he had "blown the whistle".

At the hearing into this complaint, the employer produced all of the management people who were involved with Mr. Kasper in respect to the foregoing sequence of disciplinary investigations, the demerit points assessed and the decision to terminate his employment. They all testified and were available for cross-examination by counsel for Mr. Kasper and for questions from the Board. Each and every one of them were well aware of Mr. Kasper's obsession with the dangers of exposure to asbestos and that he had complained to Labour Canada about asbestos at MacMillan Yard. They also knew about his refusal to work under Part II of the Code on October 24, 1990. However, they were all adamant that none of this had any influence on them when dealing with Mr. Kasper throughout this whole period. As a matter of credibility, we accept their testimony.

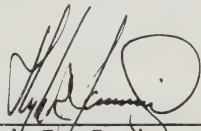
Furthermore, Mr. Kasper had no answer to the employer's response to his blatant disregard for CN Rail's rules when he went absent without leave on December 30 and 31, 1990 (for the third time), to babysit his would-be sick uncle in Detroit. If there were any lingering doubts in our minds about the sudden pattern of discipline after the Part II activities in October, and the employer's motives, they were certainly erased by the employer's restraint and responsible handling of this incident. Keeping in mind that any person reaching the 60 demerit point level is automatically dismissed, the employer did have the opportunity there if it had so chosen, to

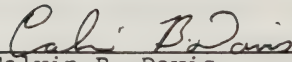
assess 35 points just to get rid of Mr. Kasper. However, only 20 points were assessed which meant his job was still safe for the time being. This is hardly the behaviour of an employer that was bent on getting rid of Mr. Kasper as he alleges.

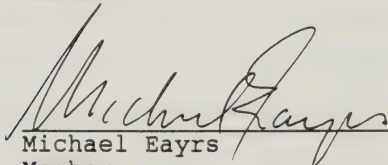
We were also impressed by Mr. Montgomery's forthright explanation about the "disqualification" letter of October 18, 1990. We accept the employer's version of how this letter came about without reservation. In the circumstances Mr. Kasper's claims that the employer initiated that move to have him reassigned without his prior knowledge is totally unacceptable.

Taking all of the foregoing into account, the Board is satisfied that the complaint has no merit. Mr. Kasper was not disciplined, nor was he discharged because he exercised his right to refuse to work under section 128(1) of the Code. The complaint is dismissed accordingly.

The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair

Calvin B. Davis
Member

Michael Eayrs
Member

DATED at Ottawa this 11th day of December, 1992.

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Résumé

Union indépendante des agents de bord de Nationair, requérante, Nationair Canada (Nolisair International Inc.), employeur, et Syndicat canadien de la Fonction publique (division du transport aérien), agent négociateur accrédité.

Dossier du Conseil: 555-3500

Décision n°: 980

Le 18 septembre 1992, l'Union indépendante des agents de bord de Nationair a présenté une demande d'accréditation en vertu du paragraphe 24(3) du Code en vue de représenter les agents de bord de Nationair Canada (Nolisair International Inc.) ainsi que les personnes embauchées pour remplacer ces employés pendant le lock-out qui dure depuis le 19 novembre 1991. Le Syndicat canadien de la Fonction publique (division du transport aérien), qui est accrédité depuis 1986, s'est opposé à cette demande.

Le Conseil a décidé que les personnes qui remplacent des employés en grève ou en lock-out ne peuvent pas participer au remplacement d'un agent négociateur lorsque cette question se pose pendant la durée d'une grève ou d'un lock-out.

Summary

Union indépendante des agents de bord de Nationair, applicant, Nationair Canada (Nolisair International Inc.), employer, and Canadian Union of Public Employees (Airline Division), certified bargaining agent.

Board File: 555-3500

Decision no.: 980

On September 18, 1992, the Union indépendante des agents de bord de Nationair filed an application for certification pursuant to section 24(3) of the Code seeking to represent the flight attendants of Nationair Canada (Nolisair International Inc.) and the persons hired to replace those employees during the lock-out that has been going on since November 19, 1991. The Canadian Union of Public Employees (Airline Division), which has been certified since 1986, is opposed to that application.

The Board determined that the persons who replaced the striking or locked-out employees cannot take part in replacing a bargaining agent when that issue is raised during a strike or a lock-out.

L'économie générale du Code et les règles législatives qui régissent l'organisation des rapports collectifs du travail, en particulier celles relatives à la négociation collective et à l'exercice de moyens de pression économique, ne permettent pas de soutenir la prétention selon laquelle des employés qui remplacent des employés en lock-out ont un intérêt dans le choix d'un agent négociateur pendant cette période. Les employés intéressés sont ceux visés par le litige résultant d'une impasse dans la négociation collective, impasse qui a conduit à l'imposition d'un lock-out.

Le droit pour l'employeur de continuer ses activités pendant une grève ou un lock-out en embauchant des remplaçants ne confère pas à ces personnes, en contrepartie, le droit de participer au choix d'une partie à la négociation en cours ou à la détermination des conditions de travail de ceux qu'ils remplacent. Le Conseil a rejeté la demande d'accréditation puisque celle-ci ne satisfait pas aux exigences du Code au titre de la représentativité.

Le Conseil a passé en revue les dispositions du Code applicables, la jurisprudence du Conseil en cette matière ainsi que certaines décisions rendues par d'autres conseils des relations du travail au Canada.

The general scheme of the Code and the legislative rules concerning the organization of collective labour relationships, in particular with respect to collective bargaining and economic pressure tactics, cannot support the claim that the replacement workers of the locked-out employees have an interest in choosing a bargaining agent during that time period. The interested employees are those involved in the dispute arising from a collective bargaining impasse, which led to the lock-out.

The employer's right to pursue its operations during a strike or a lockout, by hiring replacement workers, does not mean that these persons have the right to choose a party to the negotiations under way or to determine the working conditions of the persons they are replacing. The Board dismissed the application for certification since it did not meet the requirements of the Code concerning representative character.

The Board reviewed the provisions of the Code and the Board's jurisprudence on that issue as well as the case law of other Canadian labour relations boards.

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Reasons for decision

Union indépendante des agents
de bord de Nationair,

applicant,

and

Nolisair International Inc.
(Nationair Canada),

employer,

and

Canadian Union of Public
Employees (Airline Division),

certified bargaining agent.

Board File: 555-3500

The Board was composed of Ms. Louise Doyon, Vice-Chair, and Ms. Ginette Gosselin and Ms. Evelyn Bourassa, Members.

Appearances

Mr. Irving Gaul, assisted by Mr. Robert Tremblay, for the Union indépendante des agents de bord de Nationair;
Mr. Guy Tremblay, assisted by Ms. Nathalie Piccinin, for Nolisair International Inc. (Nationair Canada); and
Mr. François Côté, accompanied by Ms. Valérie Wells, assisted by Mr. J.-P. Levasseur, union advisor, for the Canadian Union of Public Employees (Airline Division).

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

Status of the File

The Canadian Union of Public Employees (Airline Division) (CUPE) was certified on December 16, 1986 to represent

"all persons employed by Nationair (Nolisair International Inc.) as cabin personnel, including those persons hired through agencies, excluding senior manager in flight service, training

*manager, line supervisor, supervisor duty free,
and administration manager."*

On September 18, 1992, the Board received from the Union indépendante des agents de bord de Nolisair International Inc. (Nationair Canada) (the Union) an application for certification to represent

"all flight attendants employed by Nationair, including those who are at present employed by Nationair as replacements for the locked-out flight attendants and who can fly in any aircraft owned, used or under the authority of Nationair."

(translation)

The application for certification, if granted, would result in the revocation, pursuant to section 36(1) of the Code, of the certification held by CUPE and in its replacement by the Union as certified bargaining agent.

On November 19, 1991, Nolisair International Inc. (Nationair Canada) (the employer) locked out its flight attendants. On September 18, 1992, the flight attendants were still locked out. During that period, the employer continued to provide in-flight services using replacement workers and a number of flight attendants who, although locked out, continued to perform their duties. As the description of the proposed bargaining unit indicates, the Union is seeking to represent the employees covered by the existing certification order, namely, the flight attendants employed by Nolisair International Inc. (Nationair Canada) on or before November 19, 1991, as well as the employees who are replacing them.

CUPE challenged the application for certification on the ground that it is not appropriate to include in the same bargaining unit locked-out employees and their replacements. It alleged that this situation would prevent the exercise of the rights conferred by the Code, in particular the right to bargain collectively. The employer took no explicit

position on the appropriateness to bargain of a unit comprising both locked-out employees and their replacements. It did, however, suggest that the text of the certification order be updated.

Following receipt of this application for certification, the Board began the routine investigation it conducts in this type of case. It obtained the submissions of the parties. The employer provided the lists of the employees covered by the application, clarifying the employment status of these persons as of November 19, 1991 and as of September 18, 1992.

On October 22, 1992, the Board asked the parties to file written submissions, not later than November 2, on the question of the criteria governing the eligibility of the persons that must be considered in determining whether the Union and CUPE possessed the representative character in respect of the bargaining unit sought in the application for certification of September 18. It indicated that it would hear the parties at a public hearing on November 5, 1992, in order to receive their final submissions on this question.

On November 5, with the Board's consent, both the Union and CUPE presented their respective arguments on the eligibility of the replacement workers for the purpose of determining the representative character of the trade union. The employer, for its part, had already informed the Board, in reply to the October 22 request, that it intended to discuss the eligibility of certain persons whose employee status as of September 18, 1992 seemed questionable, in particular the status of flight attendants laid off before the lockout or dismissed after that date. This aspect of the question was not specifically dealt with at the hearing. The Board, however, informed the parties that if the status of certain employees in Nationair's employ on or before November 19,

1991 or dismissed after this date had to be examined in order to decide the application for certification, the parties would have the opportunity to file additional submissions. The Board also indicated, following counsel for CUPE's presentation of arguments, that it would give the parties the opportunity to be heard on allegations of bad faith bargaining made against the employer, if it deemed it appropriate to examine this question in deciding the present application.

On November 16, 1992, the Board, after examining the evidence and arguments, concluded that the persons working as replacements for the flight attendants locked out by Nationair are not eligible for the purpose of determining the representative character of the trade union in respect of the bargaining unit sought. The Board therefore dismissed the Union's application for certification because it did not meet the Code's requirements in this regard. The Board informed the parties of this decision and indicated that the reasons for decision would follow. The following are those reasons.

II

The Decision

The question the Board must answer in this case was decided in CJMS Radio Montréal (Québec) Limitée (1978), 33 di 393; and [1980] 1 Can LRBR 270 (CLRB no. 151). In that case, the Board held that only employees who were employed by CJMS when the strike was declared, who had not been dismissed and who had not resigned since, as well as the persons hired to replace the employees who resigned or were dismissed, as the case may be, were eligible to vote during a representation vote held following an application for certification to displace the certified bargaining agent.

The Board said the following:

"... It follows that those persons who were hired to replace the striking employees are not considered employees for the purpose of determining the majority status of the unit in question. As replacements, they occupy temporary positions pending the return of those whom they are replacing. They therefore have no possible community of interest with the incumbents of these positions."

(pages 406; and 280; emphasis added)

That decision was issued a few months after the decision in Arthur T. Ecclestone (1978), 26 di 615; [1978] 2 Can LRBR 306; and 78 CLLC 16,142 (CLRB no. 132). In the latter case, the Board had received an application for revocation of certification during a strike. It did not on this occasion decide conclusively the question of the eligibility of replacement employees to participate in the decision regarding revocation of the certification of the bargaining agent. However, after reviewing the legislation and the case law in Canada on this question, in particular the decision of Bastin, J., in Brandon Packers Limited (1960), 33 W.W.R. (Q.B.), the Board expressed the following opinion:

"These fine questions about when a strike is no longer a strike and whether replacement employees may participate in a decision or actually make a decision to remove or displace the union representing persons they replace are serious fundamental questions of policy in our collective bargaining system. ..."

"... We do wish to say that it is our initial conclusion that the divergent economic interests recognized by Bastin, J. in Re Brandon Packers Limited, supra, and fleshed out by Professor Arthurs lead us to favour a decision in which only those who were employed on the day of the commencement of the strike and still have an interest in the issue should decide the representational question. ..."

(Arthur T. Ecclestone, supra, pages 626; 314; and 514; emphasis added)

This opinion became the Board's policy a few months later with the decision in CJMS Radio Montréal (Québec) Limitée, supra. It has not changed since.

The Union admits that the Board has very broad discretion in determining the criteria governing eligibility of the persons who are to be considered for the purpose of determining whether a trade union possesses the representative character. This exercise in fact is mainly the result of the Board's primary power to determine who are employees eligible to participate in the selection of a bargaining agent at a given point, in this case during a strike or lockout.

In this regard, the Union advanced, in its written submissions, an argument which, in its opinion, should persuade the Board to abandon the interpretation of the notion of employee adopted in the CJMS case in 1978.

This argument can be summarized as follows. Section 2(d) of the Canadian Charter of Rights and Freedoms has recognized, since 1982, that every person has the right to freedom of association. This provision, it argued, when read together with section 8(1) of the Code which stipulates that "every employee is free to join the trade union of his choice and to participate in its lawful activities," leads to the conclusion that an employee within the meaning of the Code enjoys the basic freedom to belong to a trade union and hence gives the replacement employees the right to be declared eligible to participate in the selection of the bargaining agent in situations like this one. To consider only employees in the employer's employ when a lockout is declared in determining the representative character of a trade union is, according to the Union, contrary to the Charter. The Union further argued that the right to equal treatment before the law under section 15 of the Charter would be negated were the Board to so decide.

The Union repeated that argument at the public hearing. However, it did not elaborate on, develop or expand on its

position on this question, despite an explicit invitation from the Board to do so. The Union did not cite any case law or doctrine in support of that argument. In the circumstances, the Board considers that the mere statement of that argument, without a clear and persuasive demonstration of its merits, is not sufficient to persuade the Board to abandon the notion of employee adopted by the Board in its past decisions and by other labour relations boards in Canada.

The general scheme of the Code and the legislative rules that give substance to the principles governing the organization of collective labour relations, in particular the rules relating to collective bargaining and the exercise of forms of economic pressure, do not support the argument that replacement employees have an interest in the selection of a bargaining agent during a strike or lockout.

In this sense, the Board, which has to determine which of the employer's employees, i.e., the locked-out flight attendants or the replacement flight attendants, or both, should participate in the review, during a strike or lockout, of who should be the bargaining agent, must examine this matter having regard to the objectives of collective bargaining, the identity of the parties to this bargaining and the objectives of using a form of pressure such as the strike or lockout.

Section 3 of the Code defines the parties to collective bargaining as follows:

"'parties' means

(a) in relation to the entering into, renewing or revising of a collective agreement and in relation to a dispute, the employer and the bargaining agent that acts on behalf of his employees, ..."

In the instant case, these parties are Nolisair International Inc. (Nationair Canada) and the Canadian Union of Public Employees (Airline Division). The employees represented are flight attendants included in the bargaining unit that the Board deemed appropriate for bargaining in 1986.

These parties have, once already, engaged in collective bargaining. On April 28, 1988, they signed a collective agreement covering the period from April 22, 1988 to December 31, 1990. In November 1990, a new bargaining round began between these same parties with a view to renewing that collective agreement.

The Union's application for certification seeks to replace one of the parties that has bargaining power, in this case CUPE, with another bargaining agent. The Code sets out the procedures for and consequences of changing a party to collective bargaining once bargaining rights have been granted either by the Board or through voluntary recognition.

Sections 44 and following of the Code thus guarantee the maintenance of union representation and the protection of the rights associated with it, including the right to negotiate a collective agreement with the new employer, should the employer decide to sell its business. The Code thus ensures continuity in the conduct of collective relations where there is a change of employer or in the employer's legal structure.

Sections 24 and following of the Code determine the rules of certification, in particular the point at which a union seeking to displace another union can make an application for this purpose. In that situation, the certified bargaining agent could change if a majority of employees in

the existing bargaining unit express such a wish. Section 36 sets out the consequences associated with the granting of certification.

The prohibition against changing bargaining agent at any time ensures durability of its recognition so as to enable it to exercise effectively the representation rights resulting from this recognition. It also ensures continuity of the collective labour relationship, a guarantee of industrial peace. In that sense, the fact that the time or times at which the wish to change bargaining agent can be expressed is or are determined with reference to the term of the collective agreement shows that the purpose of the rules governing the organization of collective relations is to ensure respect for the rights of the opposing parties and relative durability of the parties' relationship.

Where a strike or lockout is declared, the Code establishes, in section 24(3), a specific rule for filing an application for certification:

"24.(3) An application for certification under subsection (2) in respect of a unit shall not, except with the consent of the Board, be made during the first six months of a strike or lockout of employees in the unit that is not prohibited by this Part."

This rule must be interpreted with reference to the objectives of collective bargaining and the purpose of the form of pressure.

In this regard, in CJMS Radio Montréal (Québec) Limitée (1978), 28 di 946; and [1979] 1 Can LRBR 426 (CLRB no. 150), the Board, after recalling that a union can be displaced at certain times if the employees in the bargaining unit are dissatisfied with its representation, had the following to say regarding section 24(3):

"... However, the legislator foresaw that a strike or lockout permitted by the Code could result from such negotiations. In order to give the union more leeway in this situation, the legislator stipulated that an application for certification made by a rival union could not be entertained except with the consent of the Board, if it was made during the first six months of a strike or lockout sanctioned by the Code. The legislator therefore established certain time constraints and the union which is given certification must bear this in mind. If the above-mentioned time period elapses without any collective agreement being signed, the incumbent union which has been unable to negotiate a collective agreement can expect to be displaced. This mechanism ensures certified employees of some control over their bargaining agent by allowing them, if they so desire, to replace this bargaining agent with another so that a collective agreement governing their working conditions can be concluded with the employer."

(pages 951; and 430)

In the instant case, it was the employer who, on November 19, 1991, drew the conclusion that the status of collective bargaining, begun a year earlier, was such that recourse to a lockout was appropriate. Section 3 of the Code defines a lockout as follows:

"'lockout' includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of his employees, done to compel his employees, or to aid another employer to compel his employees, to agree to terms or conditions of employment."

(emphasis added)

As this definition indicates, the purpose of the lockout is to compel the employer's employees to agree to terms or conditions of employment that the employer proposes in the normal course of collective bargaining.

The employees affected by the lockout remain employees of the employer under the terms of section 3(2) of the Code:

"3.(2) No person ceases to be an employee within the meaning of this Part by reason only of his ceasing to work as the result of a lockout or strike or by reason only of his dismissal contrary to this Part."

The flight attendants who worked for Nationair on November 19, 1991 and were affected by the lockout therefore continue to be employees of Nolisair International Inc. (Nationair Canada), incumbents of the positions they occupied or of the duties they performed on that date, unless the employment relationship has been severed permanently by resignation, dismissal or in some other way since then.

Case law long ago established that at the conclusion of a strike or lockout, the incumbent employees are entitled to resume their employment.

The relevant provisions of the Code are the following:

"94.(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

...

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part; ...

...

(d) deny to any employee any pension rights or benefits to which the employee would be entitled but for

(i) the cessation of work by the employee as the result of a lockout or strike that is not prohibited by this Part, ..."

In Eastern Provincial Airways Limited (1983), 54 di 172; 5 CLRBR (NS) 368; and 84 CLLC 16,012 (CLRB no. 448), the Board, after citing the relevant provisions of the Code, held as follows:

"If the Code only contained section 107(2) [now 3(2)], which is a standard provision in most jurisdictions, it would be open to argument that to retain 'employee status' does not necessarily mean a guarantee of a job. But, Parliament went much further than section 107(2) [now 3(2)] to

protect the continued employment of those who exercised their rights under the Code. The construction of section 184(3)(a)(vi) [now 94(3)(a)(vi)] could leave absolutely no room for doubt that employees cannot be deprived of any term or condition of employment whatsoever because of participation in a lawful strike. If an employee is so deprived, a reason, other than the exercise of the right to strike, must be present."

(pages 210-211; 408; and 14,117)

That decision followed the decision in General Aviation Services Ltd. (1982), 51 di 71; [1982] 3 Can LRBR 47; and 82 CLLC 16,177 (CLRB no. 385), in which the Board said the following:

"The Code provides employees who have participated in a lawful work stoppage with special status and protection in sections 107(2) [now 3(2)], 184(3)(a)(vi) [now 94(3)(a)(vi)] and 184(3)(d)(i) [now 94(3)(d)(i)]: ..."

(pages 84; 57-58; and 743-744)

The protection of the continuation of the employment of employees at the conclusion of a strike and their right to be recalled to work in accordance with the rules of seniority is the same, a fortiori, for locked-out employees. They, unlike striking employees, did not decide, but were compelled lawfully, but nevertheless compelled, to cease performing their duties by the employer in the exercise of their right to bargain collectively. Such are the rules of collective bargaining.

Since these legislative rules are in place and since the interpretation given to them is accepted, answering the question of which employees are eligible to select a bargaining agent, where an application for certification is filed during a strike or lockout, necessarily involves identifying the employees who are affected by the dispute leading to the declaration of a lockout and who have an interest in the outcome. In the present case, the settlement should produce a collective agreement and lead to

a return to work, thereby bringing an end to the collective bargaining begun in November 1990.

In the Board's opinion, these employees are the ones who bargained unsuccessfully with the employer, through their certified bargaining agent, during the bargaining process which has yet to be completed. They are the ones who, at one point, refused to accept the employer's bargaining proposals. This refusal led the employer to use, when it deemed appropriate, a means to compel them to agree to terms or conditions of employment, in the hope that this form of pressure would persuade them to enter into a collective agreement on its terms. In short, they are the ones who belonged to the bargaining unit on November 19, 1991, who were affected by the collective bargaining then in progress and who have an interest in the outcome.

During the lockout, the employer continued its operations by hiring persons to perform the duties of the locked-out flight attendants. Case law has repeatedly held that replacement employees had a temporary employment status. This is what the Board concluded in CJMS Radio Montréal (Québec) Limitée (151), supra, and what it reaffirmed in General Aviation Services Ltd., supra, in these words:

"On the other hand the status of those persons hired during a work stoppage is very tenuous to say the least. Their only protection is the existing legislated minimums such as minimum wage regulations. Unless the work stoppage extends over a one-year period they do not even qualify for the 'just cause' dismissal recourses under Part III of the Code. Regardless what an employer may promise such persons, they are only filling a temporary void and their existence is subject to the nature and outcome of the dispute. To say that they are employees in the bargaining unit represented by the very trade union that is involved in the dispute stretches the imagination to the very borders of the ridiculous."

(pages 84; 57-58; and 743-744)

The right of the employer to continue its operations during a strike or lockout by hiring temporary employees does not, however, give the latter a right to participate in the choice of a party to bargaining in progress or the determination of the terms or conditions of employment of the employees they are replacing. This being the case, the Board can only note that the general scheme of the Code precludes recognizing that these replacement employees have an interest in the bargaining process that began and that saw, even before they began their employment, the applying of a form of economic pressure to the incumbents of the positions they now occupy temporarily.

In this regard, in Bird Machine Co. (1990), 10 CLRBR (2d) 251, the Saskatchewan Labour Relations Board, which had to determine whether the workers who replace strikers were required to pay union dues under the Trade Union Act, stated the following:

"When a strike is declared and members of the bargaining unit walk out, the appropriate functional unit 'walks out' with them. The employer then has the right to employ management personnel and replacement workers for the purpose of doing the work of the bargaining unit. However, those non-union replacement workers do not become members of the bargaining unit any more than management personnel who are also replacing striking employees.

Members of an appropriate unit call a strike with the intention that it will be instrumental, as part of the collective bargaining process, in concluding a collective agreement with the employer. The employer's equivalent economic bargaining weapon is to make the necessary adjustments to take the strike and stay in operation. The raison d'être of replacement workers is to assist the employer in attaining that goal. Replacement workers are employed to advance management's interests in times of strike or lockout. They have no immediate interest in, nor do they derive any benefit from, negotiating the conclusion of a collective bargaining agreement with the employer. This observation of the function of replacement workers is in no way pejorative, but rather a reflection of the reality that they do not share a community of interest with striking employees in attaining the fundamental goals of collective bargaining.

Considering that one of the basic purposes of the Trade Union Act is to facilitate the right of employees to organize for the purpose of bargaining collectively, it becomes apparent that replacement workers cannot be part of the bargaining unit because of their obvious conflict with the community of interest shared by members in the appropriate unit."

(pages 259-260)

This too was the position taken by the British Columbia Labour Relations Board in Muckamuck Restaurant Ltd., [1979] 3 Can LRBR 301, and reaffirmed in Adams Laboratories Ltd. et al., [1980] 2 Can LRBR 101, in which it said the following:

"... for the purposes of Section 52(2), the issue of whether the trade-union has lost majority support is determined by reference only to those employees who were employed at the time the strike began and who may reasonably be regarded as having a continuing interest in the outcome of the dispute. The so-called replacement employees simply do not count. ..."

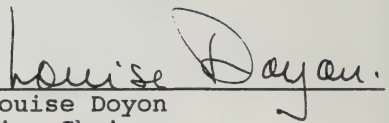
(Adams Laboratories Ltd. et al., supra, page 103)

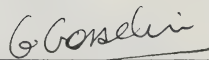
To give another interpretation of the notion of employee for the purpose of determining the representative character of a trade union during raiding in the course of a strike or lockout would negate the process of union representation by condoning interference in the expression of the wishes of the employees concerned. It would also compromise the fulfilment of the objectives of the collective bargaining system established by the Code and, at the same time, the objective of industrial peace.

For these reasons, the Board concludes that only the employees who were in the employer's employ on November 19, 1991 have the right to express whether they wish to replace the present bargaining agent with another one.

Since the Union did not establish that it possessed the necessary representative character, the Board dismissed its application for certification.

This is a unanimous decision.


Louise Doyon
Vice-Chair


Ginette Gosselin
Member


Evelyn Bourassa
Member

ISSUED at Ottawa, this 16th day of December 1992.

Information

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Summary

NELLA SPADAFORA, EMPLOYEE, AND CANADIAN AIRLINES INTERNATIONAL LTD., EMPLOYER, AND GREG GARRON, SAFETY OFFICER.

Résumé

NELLA SPADAFORA, EMPLOYÉE, ET LIGNES AÉRIENNES CANADIEN INTERNATIONAL LTÉE, EMPLOYEUR, ET GREG GARRON, AGENT DE SÉCURITÉ.

Board File: 950-208

Dossier du Conseil: 950-208

Decision No.: 981

Décision n°: 981

This decision deals with a reference to the Board pursuant to section 129(5) of the Code of the decision of a safety officer concluding that no danger exists.

Cette décision porte sur un renvoi au Conseil, en vertu du paragraphe 129(5) du Code, de la décision d'un agent de sécurité selon laquelle il n'existait aucun danger.

The safety officer's decision was made following investigation of a refusal to work made by an employee pursuant to section 128(2)(b) of the Code. The refusal was based on a condition of employment which, according to the employee, constituted a danger to her, because of her personal predisposition to back injury.

La décision de l'agent de sécurité a été prise à la suite d'une enquête portant sur le refus de travailler d'une employée fondé sur l'alinéa 128(2)b) du Code. Le refus visait une condition de travail qui constituait, selon l'employée, un danger, en raison de sa prédisposition aux maux de dos.

The condition of employment in question, lifting baggage, is recognized as being a normal condition of employment that would not constitute a danger, but for the employee's personal condition.

Il est reconnu que la condition de travail en cause, soulever des bagages, est une condition normale d'emploi et il est admis qu'elle ne constituerait pas un danger, si ce n'était de l'état de santé de l'employée.

The Board finds that because of section 128(2)(b) of the Code, no danger can be found to exist if a condition in a workplace is a normal condition of employment. The Board therefore confirms the decision of the safety officer.

Le Conseil juge qu'en raison de l'alinéa 128(2)b) du Code, il ne peut conclure à l'existence d'un danger si une condition au lieu de travail est une condition normale de travail et confirme donc la décision de l'agent de sécurité.

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Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Ms. Nella Spadafora,

employee,

and

Canadian Airlines
International Ltd.,

employer,

and

Mr. Greg Garron,

safety officer.

Board File: 950-208

The Board was composed of Mr. J. Philippe Morneault, Vice-Chair, sitting as a single member panel pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances:

Mr. Jim Browne, chairperson, Canadian Auto Workers, Local 1990, for the employee;

Mr. Gregory J. Heywood, counsel, accompanied by Mr. Paul Barfoot, Resources Manager, for the employer;

Mr. Greg Garron, on his own behalf.

I

This case deals with the reference to the Canada Labour Relations Board, pursuant to section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health), of the decision of a safety officer. The reference to the Board arose from a refusal to work by Ms. Nella Spadafora on July 29, 1991 and a subsequent investigation by safety

officer Greg Garron. The safety officer, in a decision dated July 31, 1991 that was communicated to the employee on August 2, 1991, concluded that the circumstances of the refusal by the employee did not constitute a danger within the meaning of the Code.

On August 9, 1991, Ms. Spadafora requested that the safety officer's decision be referred to the Board by virtue of section 129(5) of the Code which reads as follows:

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

The Board heard the parties at Toronto on November 28, 1991.

II

Ms. Nella Spadafora is a passenger agent or sales and service agent with Canadian Airlines International Ltd. Her regular duties as such include, among others, passenger check-in, ticketing, fare quotation, calculation of aircraft weight and balance for loading of aircraft. These regular duties, depending on the work location, sometimes require the employee to transfer passengers' baggage from the scale on which the passenger placed it to the conveyor belt.

On or about May 13, 1990, Ms. Spadafora sustained a back injury in an automobile accident that occurred while she was off duty. As a result of this accident, she did not return to work until March 1991. Prior to her return to work, her medical doctor had advised her not to do any lifting, since she could further injure her back.

Although the company has a programme of light work for employees who return to work following leave due to work related injuries, it has no such programme for employees who return to work following leave for any other injuries.

After her return to work, Ms. Spadafora resumed her duties as passenger agent but mostly in an area where the scale on which passengers place their luggage is directly connected to the conveyor belt and the passenger agent does not have to handle the luggage. Although she had been assigned to the ongoing baggage room since her return to work on March 1991, she had always been able to find another passenger agent willing to switch assignments. She had not therefore had to do any lifting since her return to work.

On July 29, 1991, Ms. Spadafora was assigned to the ongoing baggage room, Terminal 111, Lester B. Pearson International Airport, in Toronto. At that work location, the scales on which the passengers set their luggage are not directly connected to the conveyor belts. A distance of approximately three feet (one meter) separates the scale from the belt and the belt is approximately 6 to 8 inches (15 to 20 centimeters) higher than the scale. The passenger agents must therefore raise the luggage from the scale onto the conveyor belt. All the passenger agents employed by the employer including Ms. Spadafora have

received training in lifting procedures.

On that day, Ms. Spadafora was unable to find anyone with whom she could switch assignments, and, for the first time since her return to work, she found herself in a situation where she would have to do some lifting.

At the beginning of her shift, at approximately 4:15 p.m. Ms. Spadafora exercised her right under section 128(1) of the Code and refused to work in the ongoing baggage room. Section 128(1) reads as follows:

"128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee, the employee may refuse to use or operate the machine or thing or to work in that place."

Ms. Spadafora made it clear that her refusal was based on a condition of employment existing at that place, namely lifting baggage, which, because of her personal condition (pre-disposition to back injury) constituted a danger to her.

The safety officer, Mr. Greg Garron, was notified of the refusal at approximately 4:45 p.m. the same day. Accompanied by Mr. Jean-Maurice Pigeon, Labour Affairs Officer with Labour Canada, Mr. Garron arrived at the site at approximately 6:30 p.m. and, pursuant to section 129(1) of the Code he investigated the matter in the presence of the employee and several employer representatives.

After his investigation the safety officer rendered the following decision in writing, on July 31, 1991:

"Decision:

After investigating and considering that:

- 1. The risk to her health and safety is due to a personal condition that could be aggravated by lifting of any kind regardless of weight.*
- 2. She has received training in lifting procedures as required by article 14.48 Part XIV, 'Materials Handling', Canada Occupational Safety and Health Regulations.*
- 3. The advice not to lift at all is medical advice specific to her personal condition.*
- 4. Lifting is a normal function of a passenger agents job and does not constitute a danger as defined in section 122(1) of Part II of the Canada Labour Code.*

I conclude the inexistence of danger."

This is the decision referred to the Board for inquiry.

III

At the hearing, the employee's representative recognized that the passenger agents' duties which require them to lift baggage from the scale and to transfer it onto the conveyor belt are not normally considered to be dangerous work; he argued however, that because of Ms. Spadafora's special condition (her pre-disposition to back injury because of her prior injury), these duties constituted a danger to her within the meaning of the Code, and therefore the Board should give the direction that the safety officer ought to have given in the circumstances to correct the problem.

The employer, on the other hand argued that the condition

complained of by Ms. Spadafora was inherent to her work as a passenger agent and that it was a normal condition of employment for passenger agents. The employer further argued that an employee could not refuse to work because of a condition that only constituted a danger to that particular employee, and only because of that employee's condition.

IV

The parties agree that lifting passengers' luggage off the scale and transferring it to the conveyor belt is a normal part of the work of a passenger agent at the workplace in question. They also agree that all of the employer's passenger agents have received training in lifting procedures and that such lifting would not normally be a danger to the employee were it not for her special condition (pre-disposition to back injury due to a prior accident).

Danger is defined in section 122(1) of the Code as follows:

"'danger' means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected;"

The novel feature of this case is that the only claim made for the existence of danger as defined in the Code is based on Ms. Spadafora's special condition or pre-disposition to back injury due to a prior accident. The closest which the Board has come to this notion is discussed in Raymond Tremblay (1989), 79 di 1 (CLRB no. 764), where Mr. Tremblay's state of health was one of the grounds considered by the safety officer. The Board had this to say:

"The third ground for the safety officer's decision has to do with the complainant's medical condition, examined in relation to his work as a machinist. His medical record confirms that the complainant has suffered two work accidents while working with his current employer. According to the neurosurgeon's assessment, these work accidents resulted in two herniated disks, leading to permanent partial disability assessed at 11.5%. The complainant claims that his state of health prevents him from operating axle sanding machine #1774 because it constitutes a danger. He believes that this danger entitles him to refuse to work as prescribed by the Code.

In the Board's opinion, the complainant's present state of health as described in his medical record does not warrant the conclusion that operating this particular machine per se, in comparison with the other duties that he is required to perform, may aggravate his condition and thus constitutes a danger within the meaning of the Code."

(pages 7-8)

Thus, the issue of whether a condition in a workplace can be found to constitute a danger to a specific employee because of that employee's pre-disposition to injury or his/her state of health has not yet been determined by this Board.

We are of the opinion that this case is not a proper case in which to make such a determination. Section 128(2)(b) of the Code qualifies the risks of danger which the safety officer can find to be a danger within the meaning of the Code. Section 128(2)(b) reads as follows:

"128.(2) An employee may not pursuant to this section refuse to use or operate a machine or thing or to work in a place where

...

(b) the danger referred to in subsection(1) is inherent in the employee's work or is a normal condition of employment."

(emphasis added)

As stated in David Pratt (1988), 73 di 218; and 1 CLRBR (2d) 310 (CLRBR no. 686):

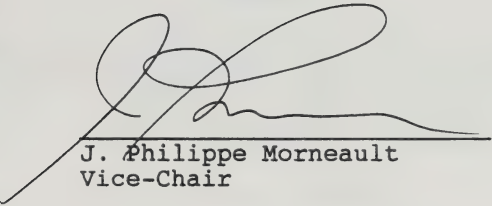
"Not only must the risk of danger be immediate, it must also involve a hazard or condition that was intended to be covered by Part IV. I agree with the safety officer's view in this case that danger under Part IV regarding an employee's right to refuse under ss. 85 and 86 and also under s. 102(2), which refers to the powers of safety officers to issue directions in dangerous situations, was not intended to deal with danger in the broadest sense of the word. For the purposes of these sections, which I believe are the only provisions in Part IV that refer to danger, the risk cannot be something that is inherent in an employee's work or a normal condition of employment (s. 85(2)). For example, a steeplejack could not refuse to work at heights because of a personal fear of heights. Working at heights is inherent in a steeplejack's work and it is also a normal condition of employment. If, however, icy conditions prevailed, the steeplejack could refuse to work in those conditions and would receive the full protection of the Code."

(pages 224; and 316)

All the parties in the instant case agree that lifting luggage forms part of the work of the passenger agents and that it is inherent in the employee's work.

Although a condition in a workplace in an appropriate case might be found to constitute a danger to a specific employee solely because of that employee's state of health or pre-disposition to injury (something which the Board is not determining in this case), no danger can be found to exist if such a condition is inherent in the employee's work or is a normal condition of employment as in the instant case.

For the above reasons, the decision of safety officer
Greg Garron is hereby confirmed.



J. Philippe Morneau
Vice-Chair

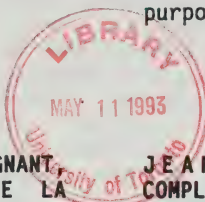
ISSUED at Ottawa, this 18th day of December 1992.

CLRB/CCRT - 981

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RESUME

SUMMARY

JEAN-PIERRE PLANTE, PLAIGNANT,
ET SYNDICAT CANADIEN DE LA
FONCTION PUBLIQUE, DIVISION DU
TRANSPORT AÉRIEN, INTIMÉ, ET
AIR CANADA INC., EMPLOYEUR.

JEAN-PIERRE PLANTE,
COMPLAINANT, AND THE CANADIAN
UNION OF PUBLIC EMPLOYEES,
AIRLINE DIVISION, RESPONDENT,
AND AIR CANADA INC., EMPLOYER.

Dossier du Conseil: 745-4076

Board File: 745-4076

N° de décision: 982

Decision No.: 982

Devoir de juste représentation.
Article 37. Code canadien du
travail (Partie I - Relations
du travail). Plainte en vertu
de l'article 97. Tardiveté de
la plainte soulevée selon le
paragraphe 97(2). Plainte
jugée recevable et accueillie.

Duty of fair representation.
Section 37. Canada Labour Code
(Part I - Industrial
Relations). Complaint under
section 97. Untimeliness of
the complaint raised under
section 97(2). Complaint found
timely and allowed.

Jusqu'en janvier 1991, le
plaignant était agent de bord
pour Air Canada. Il a remis sa
démission dans le cadre d'un
programme spécial d'incitation
à la démission négocié entre le
syndicat et l'employeur. Le
plaignant qui avait 17 ans de
service, selon des
renseignements reçus d'Air
Canada, allait toucher plus de
20 000 \$. Il n'a reçu que
4 000 \$. Quand il a voulu
contester le montant reçu, le
syndicat a refusé ou négligé de
le faire. En outre, le
syndicat a jugé que
l'interprétation de l'entente
donnée par l'employeur était
conforme et il n'a pas du tout
considéré que le plaignant
avait pu être induit en erreur.

Until January 1991, the
complainant worked as flight
attendant at Air Canada. He
resigned under a special
incentive program encouraging
resignations negotiated by the
union and the employer. The
complainant who had 17 years of
service, as per the information
received by Air Canada, was to
receive \$20,000. In fact, he
received only \$4,000. When he
sought to challenge the amount
received, the union refused or
failed to do so. Furthermore,
the union found that the
employer's interpretation of
the agreement was correct and
never considered the fact that
the complainant might have been
misled.

Le syndicat a opposé à la
plainte qu'elle était hors
délai selon le paragraphe
97(2). Le syndicat n'a pas été
franc avec le plaignant et lui
a laissé croire qu'il
s'occupait de son cas. Le
Conseil a jugé que, dans ces
circonstances, la plainte avait
été présentée dans les délais
prévus.

The union alleged that the
complaint was untimely under
section 97(2). The union was
not honest with the complainant
and led him to believe that it
was considering his case. The
Board found that, in the
circumstances, the complaint
was timely.

Sur le fond, le Conseil a jugé que le syndicat avait violé l'article 37 et il a ordonné le dépôt d'un grief et le renvoi à l'arbitrage. En outre, le Conseil a jugé que si la démission du plaignant était annulée, le syndicat devrait indemniser le plaignant pour le salaire perdu jusqu'au dépôt de la plainte. Le Conseil a aussi ordonné au syndicat de rembourser au plaignant les frais d'avocat engagés devant lui et, éventuellement, en arbitrage.

On the merits, the Board found that the union had violated section 37 and ordered that a grievance be filed and referred to arbitration. Furthermore, the Board found that should the resignation be cancelled, the union should compensate the complainant for all wages lost before the filing of this complaint. The Board also ordered the union to pay all legal costs incurred in the proceedings before it and, eventually, in the arbitration proceedings.

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CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.

Jean-Pierre Plante,
complainant,

and

Canadian Union of Public
Employees, Airline Division,

respondent,

and

Air Canada Inc.,

mis-en-cause employer.

Board File: 745-4076

The Board was composed of Mr. Serge Brault, Vice-Chairman,
and Messrs. Jacques Alary and François Bastien, Members.

Appearances

Mr. Jean-François Gilbert, for the complainant;

Mr. Frank J. Luce, assisted by Mr. Egon Keist, temporary
representative, for the Canadian Union of Public Employees,
Airline Division;

Messrs. Guy Delisle and Nicola Di Iorio, assisted by
Ms. Jane A. MacGregor, director of labour relations,
customer service, Air Canada, for the employer.

These reasons were written by Mr. Serge Brault, Vice-
Chairman.

I

This decision deals with a complaint of breach of the duty
of fair representation filed under section 37 of the Canada
Labour Code (Part I - Industrial Relations) against the
Canadian Union of Public Employees, Airline Division (CUPE
or the union).

The complainant is Jean-Pierre Plante, a former flight attendant with Air Canada Inc. (Air Canada or the employer). Mr. Plante complained that the union unlawfully refused to file a grievance on his behalf in the circumstances described below. His complaint is dated November 12, 1991.

The union disputes this complaint on two grounds. The first is that the complaint is untimely, in that it was filed outside the time limit set out in section 97(2) of the Code. The second is that it is ill-founded. All parties agreed that the Board should hear the entire case in order to rule on the argument based on section 97(2). The relevant provisions of the Code in this case are as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

....

97.(2) Subject to subsections (3) to (5), a complaint pursuant to subsection (1) shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

A hearing was held in Montréal on August 13 and 14 and on October 6, 1992.

II

THE FACTS

The Evidence

At the end of 1990, Air Canada, seeking to reduce its costs, undertook a voluntary staff reduction. For that purpose it negotiated an "Implementation of Termination/Retirement

Incentive Program" (the memorandum) with CUPE. At that time, Mr. Plante had been a full-time flight attendant with Air Canada since 1973. He was covered by the flight attendants' collective agreement between CUPE and his employer. He had about 17 years of uninterrupted service, except for a period of about a year and a half in 1985.

In 1985, Mr. Plante had been discharged, along with several of his fellow workers, in connection with a labour dispute. The discharge went to arbitration, and the arbitrator set it aside. He changed the disciplinary action retroactively into a suspension without pay for a period of 15 months. Mr. Plante was then reinstated and resumed his service. There is one detail that is important to this case: when Air Canada discharged Mr. Plante in 1985, it returned some 12 years of accumulated contributions to the Air Canada pension plan to him. Mr. Plante collected the money. When the discharge was set aside and he was reinstated, the employer, in accordance with the collective agreement, offered Mr. Plante the option of buying back the past service that had been paid to him when he was discharged, if he so desired. Mr. Plante was short of money and declined the offer. The collective agreement provides as follows in such a case:

"L3.08.05 An employee who does not elect to repay the Fund in accordance with the above will not have any of his pre-discharge/termination allowable service used to determine eligibility for or used in the calculation of any Company pension plan benefit."

Thus Mr. Plante did not buy back the past service for which he had contributed until he was discharged. However, he resumed making contributions to the pension plan again as soon as he was reinstated. At the end of 1990 his contributions left him with a credit of four years' service for purposes of the company pension fund.

This brings us to the 1990 staff-reduction memorandum. This agreement was negotiated by an ad hoc management-union committee. On the union side, the group was mandated by the then union president, Egon Keist, with Tom Slade, the Vancouver local president, put in charge of the negotiation. Mr. Udvarley, the current union president in Montréal, described him as "the most knowledgeable" of all the union leaders.

In the fall of 1990, the employees became aware of the discussions between CUPE and Air Canada for the purpose of signing the memorandum. Mr. Plante had for some time been thinking of leaving not only his work as a flight attendant but also the country. He had been on leave without pay since the fall of 1990. He went to the union office in Montréal and asked the local union representative, Linda Lavigne, about the upcoming memorandum. Ms. Lavigne, who was involved in the negotiations, gave him a broad outline. A lump sum would be determined based on each employee's years of service. Compensation equal to about 30 hours' pay, calculated on the basis of a person's salary, would be paid for each year of service accumulated by the employee. She explained, however, that the parties were still at the bargaining table and that she could definitely not tell him anything more.

In fact, the memorandum was signed several days later. Air Canada distributed copies to all its employees, accompanied by an explanatory document in the form of a series of questions and answers.

As agreed, the memorandum provided that if certain conditions were met a flight attendant, whether eligible for retirement or not, who voluntarily left Air Canada could, among other options, receive a lump sum determined on the basis of years of service. In practice, it was proposed

that resignations would be accepted, in return for a sum of money that might be as much as a full year's pay. Moreover, where applicable, an employee who left could receive retirement benefits if he or she were eligible. The following is an important passage from the memorandum.

"IMPLEMENTATION OF TERMINATION/RETIREMENT
INCENTIVE PROGRAM 1990

1. In accordance with the provisions of Article 17, the Company and the Union agreed to the attached program to achieve a reduction in the number of employees surplus to the operational requirements at each base.

...

4. The Company reserves the right to limit the number of programs available.

5. The Program will include the following documentation:

- a series of questions and answers covering the administration and other details of the Program;
- a process to estimate the employee's pension;
- a pension calculation example;
- a letter of application for signature and submission if the employee decides to accept the Program.

...

I. Eligibility:

All Cabin Personnel who are on the active payroll. The Company reserves the right to exclude those Bases where there is no surplus and to limit the number of programs by classification.

II. Incentive Award:

Thirty-five (35) hours pay for each completed allowable calendar year of Company service up to a maximum of nine hundred-ten (910) hours.

...

III. Award options:

(A) For pensionable employees

1. Lump sum cash payment.
2. Time on payroll at full salary.

...

NOTE: 1. To determine eligibility, employee should consult his local Personnel Services Representative or Base Team established to respond to program questions.

...

(B) For non-pensionable employees (Separation)

1. Lump sum cash payment.
2. Time on payroll at full salary.
3. Time on payroll at half salary.
4. Any combination of the above, except that options 2 and 3 in total may not exceed twenty-four (24) months on the payroll or beyond normal retirement age (age 65), whichever is earlier.

...

V. Application Procedure and Closing Date

Individuals electing to accept the Program are to forward their advice of acceptance to:

Manager, Crew Resource Utilization
Dorval 076A

with copies to their Local Base Director/Manager for distribution of cc's. Such notification of acceptance must be received no later than December 21, 1990.

Any notification on hand by 2359 hours EST on December 21, 1990, will be perceived as a commitment by the employee to retire/terminate from Company service, no later than January 30, 1991 (unless the employee has elected to remain on the payroll for the incentive period either in full or in part, in which case January 20, 1991 will be considered the last day of active employment.)"

(emphasis added)

Mr. Plante's companion, Lorraine Reynolds, is herself a flight attendant, but works for Canadian Airlines. She is a long-time activist and has solid experience in bargaining and representation acquired through the senior union offices she held in CUPE. She is also acquainted with several of the union representatives we shall meet later. She and Mr. Plante had the same plans for the future and they discussed them on the basis of the information available. They examined the document carefully, particularly clause II: Incentive Award (see page 5).

Together, they assessed as best they could the compensation the complainant might receive if he resigned. In view of the number of years of active service he had with the company, about 17, they estimated the compensation at more than \$20,000. They were pleased because they hoped to settle in Mexico and open a restaurant there. Both agreed, however, that they would not enter into this venture lightly, and that they would not commit themselves without first being very sure of what they were doing. Ms. Reynolds is an experienced, calm and articulate person. A skeptic, she considers that caution is advisable.

According to the procedure set out in the documents distributed by the employer, each employee interested in the operative clauses of the memorandum had to submit an application before the end of December 1990, using the form provided. The employee stated therein that he or she was prepared to leave his or her job on the terms of the memorandum. For its part, Air Canada reserved the right to accept or reject the resignation, based inter alia on the need to control the number of separations, and undoubtedly as well the total cost of the program.

Although he resided in Montréal, Mr. Plante had Toronto as his home base. The document distributed to the employees provided the following information, in the form of questions and answers:

"25. Q. Where can I get more information concerning my eligibility and the terms or amount of the incentive award under the program?"

A. From a member of the local team administering staff reduction or from your local human resources representative."

(translation; emphasis added)

At the urging of his companion, Mr. Plante decided to make inquiries before signing a form. He went first to a

representative in the Air Canada personnel office in Montréal, Lise Leblanc. He asked her how much compensation he would likely get if he took advantage of the clauses of the memorandum. Mr. Plante did not mention the fact that his 17 years of service were not all pensionable. On the basis of the information provided by Mr. Plante concerning his years of service with the company, Ms. Leblanc talked about a figure of about \$20,000, according to the complainant, confirming his own calculations. In that conversation there was never any reference to pension, for which Mr. Plante knew he was not eligible. When she was called to testify, Ms. Leblanc did not recall her meeting with Mr. Plante. However, she explained that in her eyes the expression "allowable calendar year of Company service" which appears in the memorandum (Article II, see page 5) meant "years of service during which the employee received a salary and contributed to the pension plan" (translation).

Satisfied with the result of his meeting, Mr. Plante told his companion about it. She reminded him that his home base was Toronto, not Montréal. She advised caution and suggested that he check with the personnel office in Toronto. Mr. Plante, who was still on leave without pay, went to the Air Canada personnel office in Toronto. Again, a competent person confirmed, for the same circumstances, the figure he was given in Montréal. We should note that personnel management in Toronto was handled at that time by, among others, a Ms. Slomozewski. We shall return to this.

The financial information for each Air Canada employee is maintained centrally in its finance department, located in Winnipeg. This includes the record of pension plan contributions. No official who met with Mr. Plante communicated with the Winnipeg office in this regard.

It is important to note that the money paid under the memorandum is in addition to money owing under the pension plan; in this respect, the two are unrelated. During the meetings Mr. Plante attended, the key question in calculating the resignation payment was the length of his paid service with the company, that is, paid service as distinguished from unpaid leave. In such cases, the length of any unpaid absence had to be deducted from the total length of service for purposes of calculating the termination payment.

Armed with the assurances he had received from the personnel offices in Montréal and Toronto, Mr. Plante formally elected to avail himself of the resignation procedure at the end of December 1990. He completed the necessary form and flew south with Ms. Reynolds. The form is as follows:

"TERMINATION/RETIREMENT INCENTIVE PROGRAM - CUPE
PERSONNEL COVERED BY THE COLLECTIVE AGREEMENT"

NOTE: To be returned for receipt no later than
December 21, 1990

TO: Manager, Crew Resource Utilization
Dorval 076A

This will confirm my acceptance to take early retirement or resign from the company in accordance with the provisions of the Program provided in the Air Canada/Airline Division of CUPE Joint Planning Committee letter of December 7, 1990. My preferred date of retirement/resignation is [January 30], 1991.

I request my incentive payment to be provided as follows:

Non-Pensionable Employee

A. - Lump Sum Payment

[signed: J.P. Plante]"

It was clear in the complainant's mind that he would receive a net amount of about \$20,000 in a few weeks and that his employment would officially terminate on January 30. In the meantime, he remained on leave without pay. Confident that he would shortly receive the money he was counting on, he

entered into contractual obligations for building a new life in Mexico, as a restaurateur, an occupation in which he had engaged in the past. With his companion, he invested all his savings and committed the money he was expecting.

In mid-February he learned from a colleague that the Air Canada cheques had been mailed. He came back from Mexico. In his mail was a cheque for about \$4,000, and not the \$20,000 he had anticipated in final settlement of all monies owing. Surprised and puzzled, he promptly communicated with his companion, who had stayed in Mexico. She reassured him as best she could and suggested that he immediately make inquiries.

According to the evidence, Mr. Plante then contacted Air Canada, which confirmed that the amount paid complied with the memorandum. He had no other money coming to him because, according to the employer, the only years of service taken into account in calculating the compensation were pensionable years. As we saw earlier, he had only four pensionable years, that is, the years following his reinstatement in 1986.

Mr. Plante, who could not believe his ears, rushed off to the union's Montréal office. There he met with the local president, Al Udvarley, who testified in this case. Mr. Udvarley is an experienced union activist and over the years he has been a member of the union's national executive. At that time, he was not very familiar with the memorandum, because he had not been involved in either its negotiation or its implementation. In fact, Mr. Udvarley had only just returned to his position as a full-time representative with CUPE Local 4001 in Montréal. Mr. Plante told him that in his opinion there had surely been an error in the calculations, adding that if there had been no error then he had obviously been misled. He said he would never

have resigned if he had known that he was giving up a good job for a few thousand dollars.

Mr. Udvarley, who was just as astonished, agreed to look into the matter. He therefore communicated with his management counterpart in Montréal, Pierre Viau. A few days later, Mr. Viau confirmed that in the opinion of Air Canada not only had there been no error in the calculations, but moreover that there was no question of rehiring Mr. Plante. He also told him that Mr. Plante was responsible for his own misfortune, and that in any event he was no longer an Air Canada employee. Mr. Udvarley did not share this opinion nor did he intend to drop the matter.

Mr. Udvarley then submitted the case to Barry Kirkness, the union's national president. According to Mr. Udvarley, Mr. Plante's problem was general in scope because it concerned the interpretation of the memorandum, and it therefore fell within the mandate of the union's national leadership. Mr. Udvarley further felt that he could not file a grievance himself since Mr. Plante was based in Toronto and was not a member of his local.

Mr. Kirkness replied that in his opinion Mr. Plante's argument had no basis. As Mr. Udvarley said, Mr. Kirkness seemed to have made up his mind and simply repeated to him what Mr. Viau had already said. Mr. Kirkness added, alternatively, that Mr. Plante was in any event no longer a union member. However, the case was not closed.

After conferring with Ms. Reynolds, Mr. Plante went back to Mexico where his presence was required. It was agreed that Ms. Reynolds would go back to Montréal to try to get some money to replace the lost earnings. She would also pursue the matter with the union, since she was acquainted with most of the officers and familiar with bargaining policies.

When she returned to Canada, Ms. Reynolds first spoke with Mr. Udvarley. He shared her opinion. At Mr. Udvarley's suggestion, she spoke with Mr. Tom Slade, the union representative who had negotiated the memorandum. Mr. Slade confirmed that in his opinion there had never been any intention at the bargaining table to equate "year of service" and "year of pensionable service." He suggested that she follow the usual channels and submit the problem to the union's national executive.

She then turned to the national president, Barry Kirkness, for assistance, informing him of her conversation with Tom Slade and the position he had taken. He asked her to put everything in writing, and led her to believe that the union would do something. These were the circumstances at the time she returned to Cozumel, Mexico, near the end of March.

While there, Ms. Reynolds drafted the letter that had been requested, reiterating the fact that the \$20,000 compensation to be paid had been an essential consideration in Mr. Plante's decision to resign. As she stated in cross-examination, "it was clear that if Mr. Plante had mistakenly signed the package, then he wanted his job back." The couple was in Mexico and did not trust the Mexican postal service. They gave the letter, signed by Mr. Plante, to some visitors and asked them to mail it outside Mexico. The visitors mailed it in Miami to the address of the union president in Toronto, Mr. Kirkness. Copies were also sent to four other union officers, including Egon Keist and Al Udvarley. Although this letter was dated March 30, it reached the union only at the beginning of May.

Despite this letter, the recipients did not do anything, either before or after receiving it.

In fact, the union did not acknowledge receipt, although the letter provided a telecopier number in Cozumel, Mexico, as well as the address of a colleague in Westmount, Quebec, through either of which Mr. Plante could be reached. The letter contained a clear request that if the matter were not satisfactorily resolved it be grieved and sent to arbitration. It referred to Mr. Plante's meetings with Air Canada representatives in December 1990. As Mr. Plante wrote, "I would certainly not have left my job after 18 years of service for so little."

Upon receiving his copy of the letter, Mr. Keist looked at the provisions of the memorandum. The use of the word "allowable" was enough to convince him that this was a reference to the pension plan. Since he was aware that Mr. Plante had cashed his pension fund in 1985 and had not bought back past service when he was reinstated, he felt that Air Canada was right to compensate him on the basis of only his four years of service. He added during his testimony before the Board that in addition, because of the date on which the letter was received, May 2, there was reason to fear that, in any event, the matter was already untimely: the collective agreement imposes a time limit of 60 days for filing a grievance.

Mr. Keist stated that in any event he spoke with Barry Kirkness, Linda Lavigne and Tom Slade. It seems that Tom Slade, who was not called to testify, had at that time changed his mind as to the meaning of the memorandum.

Ms. Lavigne told Mr. Keist that she had warned Mr. Plante in the fall of 1990 that he should contact the employer's representatives to determine the precise amount of money he could expect to receive.

Mr. Keist therefore concluded that, unless more information was available, there was no ground for a grievance. He admitted in cross-examination that he was not involved in negotiating the memorandum and that he was not aware of what had gone on during the negotiations. He decided not to pursue the case any further in the week following May 2, when the letter dated March 30 was received. Mr. Keist did not, however, inform Mr. Plante of this decision since, he stated, the original of the letter had been sent to Mr. Kirkness and he believed that Mr. Kirkness would look after it.

For his part, Barry Kirkness stated that he had more or less adopted the same reasoning as Mr. Keist on the merits of the case. When he was asked how his decision to do nothing had been communicated to Mr. Plante and by whom, he answered that he believed that Mr. Keist had looked after the matter, but that he no longer remembered when or how. He was very busy at that time as the union was in the process of moving.

Did he consider, right at the beginning of the case, filing a grievance to preserve Mr. Plante's rights before completing the investigation? Yes, but he dismissed the idea. On the other hand, we know that he had told Mr. Udvarley that Mr. Plante was wrong.

During this time, Mr. Plante and Ms. Reynolds were still in Mexico and still without news. Their financial situation was steadily deteriorating. They were soon out of money and, having had to liquidate their business for almost nothing, they returned to Canada at the end of June.

On July 3, Mr. Plante telephoned Mr. Keist in Montréal, who referred him to Mr. Kirkness in Toronto. He said that he did not remember his letter, but that he would look into the

matter. When Mr. Plante called Mr. Kirkness, Mr. Kirkness told him that he did not remember anything. Mr. Plante offered to send him another copy of the letter after Mr. Kirkness mentioned that the union might have misplaced it in the move. Neither Mr. Keist nor Mr. Kirkness said anything about the merits of the case or any decision by the union.

Finally, several days later, Ms. Reynolds received the following letter from the union:

"4 July 1991

...

Dear Lorraine:

Further to our conversation of yesterday, I have now located the letter we spoke about, and additionally have discussed the matter with Component President Egon Keist.

As Mr. Keist indicated in his discussion yesterday with Mr. Plante it was agreed that pensionable time would be used in the calculation of the early retirement payout. The early retirement package has been administered in this manner for all who took it.

Yours truly,

*Barry Kirkness
Vice President
Air Canada Component*

cc: E. Keist"

(emphasis added)

The first argument submitted by the union was that Mr. Plante knew or ought to have known, based on this document, that the union had done nothing about his case, nor was it going to do anything. According to Ms. Reynolds, the couple believed instead that now that the letter had been found something was going to be done and action would soon be taken. In her view, the letter was substantially different from Mr. Slade's statements as to the meaning of the agreement negotiated and, moreover, referred to the

calculation of a retirement payout. This was certainly not Mr. Plante's situation.

Several days later, the couple met Al Udvarley by accident and told him that the union still had not taken a position and apparently had done nothing.

Mr. Udvarley was afraid that the union had decided not to do anything and he told the couple he would raise the matter at the next meeting of the grievance committee. This committee is in fact the union executive committee, which was to meet later. However, it did not meet until September.

Fearing the worst and still having heard nothing from the union, Mr. Plante sent another letter to the union on August 7. The couple had earlier consulted a legal aid lawyer who could not represent the complainant, because of the financial aspect of the case. He consulted a second lawyer, Yves Fournier, who sent a notice to the union on September 10. That letter was received on September 16. It was on precisely that day that the executive committee met in Montréal. Mr. Keist, who had received the August 7 letter, decided to discuss it at the meeting. As we know, Mr. Udvarley had already promised to raise the matter.

Mr. Udvarley explained the case, including the fact that it was unfair that Mr. Plante had received only \$4,000 in return for giving up a good job after 17 years of service. The discussion seemed to him pointless since, in any event, the time limit for filing a grievance had long since passed. Not surprisingly, the committee supported the interpretation given by Mr. Kirkness and the action he had taken, that is, that he had done nothing. They therefore decided not to proceed with the case.

In the days that followed, however, counsel for the union acknowledged receipt of the notice of September 10, which reads as follows:

"September 24, 1991

...

Dear Mr. Fournier:

RE: JEAN PIERRE PLANTE

We act for the Airline Division of the Canadian Union of Public Employees. We have received your letter with respect to Mr. Plante's concerns about his separation package. The union is presently investigating the situation to determine exactly what has occurred with respect to this matter.

In connection with this investigation, please advise who Mr. Plante spoke to at Air Canada and at the union about his separation package and the specifics of such conversations. After the union's investigation is complete, we will advise you as to its decision in proceeding with this file.

If you have any questions or comments, please contact me at your convenience."

(emphasis added)

However, the union took no action and the complainant then instructed his present counsel, who initiated these proceedings before the Board on November 12, 1991.

On the merits of the case, the evidence revealed that Air Canada calculated the compensation payable to Mr. Plante based solely on the number of allowable years of service for purposes of the pension fund. Believing that the termination compensation had to be calculated on the same basis as pension entitlement, the company therefore compensated him on the sole basis of four years of service. On the other hand, the air travel passes to which Mr. Plante would also be entitled under the memorandum were calculated on the basis of his approximately 18 years of service with Air Canada.

The manner in which Air Canada calculated the compensation was perhaps not consistent. First, it appears from certain documents filed by the union that Air Canada did change its mind early in 1991, in effect after the memorandum was signed, as to how the calculation should be done.

Some items of correspondence between Air Canada and another of its flight attendants who resigned, Brian H. Spence, were also food for thought. Mr. Spence was not satisfied with the money he had received after resigning in accordance with the terms of the memorandum. He also complained to Air Canada that he had been a victim of the information provided by the Toronto personnel office with respect to resignations. On January 30, 1991 he wrote to the in-flight service base director in Toronto:

"Regarding the Incentive Award itself, I am relying on the information supplied to me by Personnel Services Manager, Pat Slomozewski, at the information meeting on the Termination Program held at Department offices in December. At that meeting Ms. Slomozewski wished to inform me of the amount I could expect under the award; she asked me for my service date and calculated the amount of the award I could expect, and in reply to my question regarding the effect of my leaves of absence on my entitlement under the plan, re-affirmed the amount of the award saying that the leaves would not affect my entitlement."

The in-flight service base director replied to him on February 1, 1991:

"In reply to your comments regarding the Information Session held in December, it was Ms. Slomozewski's understanding at that time that years of service would be utilized to calculate the payment award. However, you have been advised since then that pensionable service would be utilized to calculate the separation payment."

(emphasis added)

It must be said that in Mr. Spence's case he was claiming compensation for periods when he had been absent from work on leave without pay. In Mr. Plante's case he was claiming compensation only for periods when he was actually working

and earning a salary. In any event, it does seem that there was some hesitancy within Air Canada's labour relations department, and that may in part explain the fact that the union negotiator, Mr. Slade, changed his position.

Mr. Keist, the former union president, stated that he had taken his own ideas as to the meaning of the word "allowable" in the memorandum from the provisions of the pension plan. The pension plan defines this expression as follows, according to an information document distributed to staff:

"2. Your Allowable Service - each month with some compensation paid for services rendered to the Company counts as one full month of allowable service.

Total allowable service is limited to 35 years."

According to Air Canada and the union, Mr. Plante therefore had only four years of service for purposes of the termination award he was paid.

Mr. Plante has been unemployed since he returned from Mexico in June 1991.

III

THE ISSUE OF TIME LIMITS

The union's first argument against the complaint is based on section 97(2) of the Code, cited above (page 2). According to that provision, a victim of a violation of section 37 has 90 days from the date when the complainant "knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint" to file a complaint.

According to counsel for the union, Mr. Plante could no longer claim to be unaware that the union had done nothing and was going to do nothing about his problem as of the moment when he had knowledge of the letter of July 4, 1991, sent to Ms. Reynolds (page 15). According to Mr. Plante, Ms. Reynolds received that letter on July 7. The complaint was not filed until November 12, 1991.

The union admitted that it took no action on either the letter of March 30 or the oral requests that preceded it.

If we ask what "action or circumstances," to quote section 97(2), gave rise to the complaint, we find that on July 3 the union had not yet taken any action, properly speaking, with respect to Mr. Plante. Rather, it had let time pass without acting. The time limit for filing a grievance is 60 days. In our opinion, this is fundamental in determining what might have given rise to the complaint. It is also important in determining each party's credibility.

Until July, the union acknowledged, Mr. Plante had no ground for complaint. According to learned counsel for the union, there is no magic word for informing a complainant that a union is taking no action, and which will start the time limit set out in section 97 of the Code running. Counsel is correct; there is no strict formula and the issue must be determined based on all of the circumstances.

On July 3, the person in charge of his case told the complainant that his letter had been lost; he was not told that his case was deemed without remedy or merit. On July 4, a letter was written to his companion, not to him, which certainly did not state clearly what the union already knew, that is, that it had done nothing and would do nothing. In fact it talked about pensions, when Mr. Plante's problem specifically did not involve retirement.

According to the union, Mr. Plante ought to have inferred and understood at that point that the union was not going to do anything.

With all due respect, the Board cannot agree that such a vague and confused letter is in this case a circumstance in which Mr. Plante ought to have known that his case had been dropped. Barry Kirkness had in fact told Mr. Plante the day before that the document in question had been misplaced. The same day, Mr. Keist, knowing that the union had done nothing, had taken care not to inform Mr. Plante of this. Instead, he referred him to Mr. Kirkness. Mr. Kirkness, who had decided at the outset to do nothing, said only that he had misplaced the March 30 letter.

This series of omissions, together with a letter which in our opinion was deliberately vague, cannot be a basis for the presumption of knowledge set out in section 97(2). The knowledge that a complainant can be presumed to have is the knowledge that a reasonably diligent person can be inferred to have. It cannot be inferred, and thus used against a complainant, in circumstances where the person who has committed the violation is knowingly trying to hide the truth about his or her inaction so as to circumvent the obligations imposed by the Code.

In our opinion, there is in fact only one likely explanation for the omissions and the confused positions taken by the union. The Board believes that in July CUPE undoubtedly had reason to believe that Mr. Plante, who was quite familiar with his rights, would make a complaint. Specifically, the union was aware that it had allowed the time limit for filing a grievance under the collective agreement to pass without doing anything: without deciding this point, it appears that the 60-day time limit likely expired at the beginning of April.

Up to that point, Mr. Kirkness had done nothing although Mr. Udvarley and Ms. Reynolds had alerted him to the matter in February. His request that Ms. Reynolds set out the details of the case in writing was only a formality, and essentially dilatory, and cannot provide an excuse since the problem had been clearly identified. Moreover, Mr. Kirkness admitted that he had dismissed the idea of filing a preventive grievance following Ms. Reynolds's telephone call in March, but he did not say why.

If the July 4 letter had had the effect suggested by Mr. Luce, and started the clock running under section 97(2), then we should not forget the subsequent meeting with Mr. Udvarley. Mr. Udvarley, who was also an important union officer, clearly informed Mr. Plante that he agreed with him, without making any secret of it. He even told him that he would raise the matter at the next meeting of the grievance committee. That meeting did not take place until September. In our opinion, Mr. Plante was entitled, in the circumstances, to believe that his fate had not been sealed when a competent union officer told him that his problem was going to be discussed at an important upcoming meeting.

Perhaps being sceptical as a result of all this foot-dragging, Mr. Plante consulted lawyers without waiting and sent an initial letter in August, and then a notice in September. Here again, he received a confused if not misleading signal.

The acknowledgement of receipt which his counsel received from counsel for the union stated explicitly that the union was investigating. Additional information was even requested. A simple courtesy letter, as the union argued? Neither the document nor practice among lawyers would support such an assertion, which moreover was not based on any evidence.

Let us assume for a moment that the time limit in section 97 started to run in July, which we do not believe it did. It had therefore not run out at the time when counsel for the union wrote to Mr. Plante on September 24. That letter contradicted any idea that the union had already made a decision. Either one of two things was true: either the decision had not been made, and accordingly the time limit was not running; or the decision had been made and the time limit was running, and the letter was designed to make Mr. Plante believe otherwise. We prefer to believe that the union's decision, which had been made on September 16, was not known to Mr. Plante and, in any event, that no union decision could yet be used against Mr. Plante within the meaning of section 97(2).

Accordingly, we find that the complaint filed on November 12, 1991 complies with the Code.

IV

THE MERITS

The Supreme Court of Canada clearly summarized the parameters of the duty of fair representation in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043:

"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*

2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

3. *This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*

5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility toward the employee."*

(pages 527; 654; and 12,188)

Both counsel for the union and, in his brief submissions, counsel for Air Canada pointed out that interpretation of the collective agreement was not within the Board's jurisdiction. They are correct. Not even an incorrect interpretation of a collective agreement would be a basis for a complaint under section 37 of the Code (page 2). However, this does not settle the matter.

Without deciding the meaning to be given to the collective agreement, what the Board must ultimately ascertain in all cases is whether the complainant is correct in believing that the union violated the Code in respect of an important right. (See M'hammed Soufiane (1991), 84 di 187; and 91 CLLC 16,052 (CLRB no. 860); Anthony William Amor (1987), 70 di 98; and 18 CLRB (NS) 249 (CLRB no. 633); and Serge Gervais (1983), 53 di 104 (CLRB no. 418), affirmed by the Federal Court of Appeal in Serge Gervais v. Canada Labour Relations Board, judgment rendered from the bench, no. A-874-83, November 5, 1984.)

The Board has said at a plenary session that when an employee's career is at stake, a union must act with great care (see Brenda Haley (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304)). Mr. Plante was encouraged to resign or give up his job. This is an

important, indeed very serious, issue as Mr. Plante's job was at stake.

CUPE is the largest union in Canada. Its airline division has a number of employees; at the time it also had the full-time services of a lawyer. There can be no doubt as to the fact that CUPE had the resources to deal carefully with a question such as the one raised in Mr. Plante's case.

According to the union, Mr. Plante was the author of his own misfortune. It accused him of not having told everything to the competent people with whom he met, or not having checked everything before resigning. The union added that it sincerely considered Air Canada's ultimate interpretation of the memorandum to comply with the memorandum.

A careful review of the evidence does not support the position advanced by learned counsel for the union, at least for our purposes. Rather, the evidence establishes that the union officers responsible for the case had not seriously considered Mr. Plante's case. As clearly stated in the letter from Ms. Burns in September 1991, the union finally looked into what had happened almost 10 months after the incident, i.e., long after any grievance had become untimely. The union had gathered the essential facts in February, and received a detailed letter from Ms. Reynolds in May. In July, Mr. Kirkness stated that he had forgotten the matter and misplaced the letter. According to another union officer, he seemed to have already made up his mind the preceding February. He even added that Mr. Plante was no longer an employee, which leads us to believe that the vice-president had already decided at that point that nothing could be done for him.

According to Mr. Kirkness, the department responsible for determining the money payable to Mr. Plante was Air Canada's

personnel office. It is known that the figures which that office gave to Mr. Plante were incorrect. What did he have to say about the fact that Mr. Plante had consulted precisely that office on two occasions before resigning? In his view, that was not significant, because in his eyes Mr. Plante concealed from them the status of his retirement fund.

In truth, the union dismissed outright the possibility that Mr. Plante had made a mistake or had been misled. According to Mr. Kirkness, there could have been no mistake because, as he essentially said, "there was no misunderstanding in our minds as to what the document [memorandum] meant" (emphasis added). One thing is certain: there was no investigation at that time.

He also dismissed Mr. Plante's specific allegation that the personnel office might have misled him on two occasions. He stated that he did not believe that the personnel office could have said what Mr. Plante was claiming. If the union had made the slightest inquiries, it would have found what its own documentation shows today with respect to Mr. Spence (page 18): in fact, the Air Canada personnel office had changed its opinion as to the meaning of the word "allowable."

The comments made by both Mr. Kirkness and Mr. Keist are, on analysis, contradicted by the comments of Ms. LeBlanc, an assistant in the personnel office, whom the company called to testify. She was a credible and frank witness. When she was asked what she understood by allowable service "at the time when she met with the employees," she answered simply "service during which the employee contributed to the pension plan" (translation).

Let us examine more closely the criticism levelled against Mr. Plante for believing that his compensation would be calculated on the basis of 17 years of service. Without deciding the question for the purposes of the collective agreement, we have nonetheless looked at the question solely for the purpose of assessing the negligence argument. To paraphrase Ms. Leblanc and the official definition of allowable service, Mr. Plante received compensation and contributed to the pension plan for 17 years (see the definition reproduced on page 19). On the other hand, he cashed his pension fund for 13 of his 17 years of service. Then, retirement benefits and resignation benefits are independent of each other according to the actual provisions of the memorandum, which sets out two models depending on whether or not the individual is entitled to a pension.

The union suggested that memorandum of agreement no. 3 (page 5) set out in the collective agreement had provided it with support for its decision not to do anything and for its opinion with respect to Mr. Plante's negligence. Once again, without deciding the effect of this provision for the purposes of arbitration, we do not see how it can help the union in this case.

Upon even a cursory examination, the union's interpretation exhibits a superficial analysis on its part and leads to some surprising results, to say the least. The Board asked a union witness to explain what would have happened in this case, if Mr. Plante, according to the union's interpretation, had been terminated and reinstated in December 1990 rather than four years before. We know that the union's interpretation is that by not buying back his past service Mr. Plante had waived, for the years not bought back, any compensation entitlements on resignation. The union contended that this was a very reasonable interpretation. With all due respect, we are not persuaded

of the seriousness of this suggestion. In the above example, Air Canada would not have had to pay anything to the complainant. In short, it would be reasonable to interpret the memorandum to mean that nothing would be given in return for the resignation of an employee with 20 years of service, according to the union.

What we see from our review of the evidence, first, is that the union allowed the time limits set out in the collective agreement to run out without taking any action. It gave no reasonable explanation for this. Waiting for a letter before taking action, when the union already had the essential information in hand, was unreasonable. Besides being bureaucratic, this excuse was not supported by the evidence: even once the letter was received, the union did nothing.

Second, the union did not conduct any serious investigation into what were already very simple facts.

Third, it did not give serious consideration to certain crucial aspects of Mr. Plante's case. Even if the union shared Air Canada's interpretation of the memorandum, rightly or wrongly, it was not relieved of its obligation to enquire whether Mr. Plante might have made a mistake or been flat out misled. This question was never seriously examined, and yet it is fundamental. Given that in a program designed to encourage voluntary resignation the money expected is from all appearances THE essential consideration in leaving a job, the union could not have been unaware of the importance of the question in this case. It provided no explanation for this omission on its part.

In short, the union's inaction for a period of some months, and its superficial approach in examining the question, can only be described as gross negligence. The half-truths and

ambiguous letters also constitute bad faith contrary to the Code.

For all these reasons, the Board allows Mr. Plante's complaint and finds that the Canadian Union of Public Employees, Airline Division, violated section 37 of the Code by failing to grieve the compensation paid by Air Canada to Mr. Plante in February 1991.

V

CONCLUSION AND REMEDIES

Sections 99(1)(b) and 99(2) state as follows:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(b) in respect of a contravention of section 37, require a trade union to take and carry on on behalf of any employee affected by the contravention or to assist any such employee to take and carry on such action or proceeding as the Board considers that the union ought to have taken and carried on on the employee's behalf or ought to have assisted the employee to take and carry on;

...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

Accordingly, the Board orders the union to file a grievance within 15 days claiming from Air Canada the money which Mr. Plante believes is owing to him under the terms of the memorandum, and taking into account all his allowable years of service at the date of his resignation. For that purpose, the Board relieves the union of all time limits set out in its collective agreement with Air Canada.

Additionally, the grievance shall claim, where appropriate, that if the complainant is not awarded the money he is claiming under the memorandum, his resignation as of January 30, 1991 shall be set aside for lack of consent or otherwise.

If the union and Air Canada do not succeed in settling the grievance to the satisfaction of the complainant within the time limit set out in the collective agreement, the union shall immediately refer the grievance to arbitration. It will then be up to the arbitrator to decide the grievance on the merits, in light of the evidence presented.

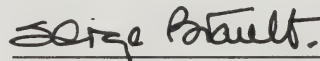
If Air Canada's calculations are wrong and the complainant is entitled, according to the arbitrator's decision, to additional monies under the memorandum because he resigned, such monies shall be determined and paid in accordance with the collective agreement and the memorandum.

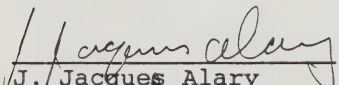
However, a specific remedy should be provided in the event that the complainant is not entitled to additional compensation and the arbitrator determines that the resignation is void for lack of consent or otherwise. If, in that case, the arbitrator orders that Mr. Plante be compensated accordingly, then the union shall be liable to pay any lost salary which according to the arbitrator is owing to the complainant for the period between the date of his resignation and the date of this decision. According to

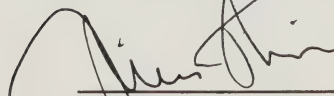
the Board, it is not Air Canada's responsibility to pay for an error on the union's part, since if the union had filed a grievance within the proper time limit there is nothing to indicate that the company would have had to make such payment, not having received something in return.

Moreover, the complainant may be represented by counsel if he so desires in the grievance and arbitration proceedings. In that case, the union shall reimburse all reasonable legal costs incurred. Similarly, the union shall within 30 days reimburse the complainant for such reasonable legal costs incurred in these proceedings.

Finally, the Board appoints Suzanne Pichette, director of the Board's regional office in Montréal, to assist the parties in implementing this decision. The Board further reserves the right to decide on request any problem arising from the implementation of this decision and to issue a formal order, if necessary.


Serge Brault
Vice-Chairman


J. Jacques Alary
Member


François Bastien
Member

ISSUED at Ottawa, this 21st day of December 1992.

Information

This is not an official document. Only the Reasons for Decision can be used for legal purposes.

SUMMARY

Sheila Green, complainant, and Air Niagara Express Inc., employer.

Board's File: 950-229

Decision No.: 983

This decision deals with a section 133(1) complaint alleging violation of section 147(a) of the Code. The complainant, a Chief Flight Attendant for Air Niagara, alleges that the employer violated section 147(a) by terminating her employment for having exercised her right to refuse to perform work in conditions she considered to be unsafe.

The respondent submitted that the complainant refused to discharge her responsibilities under Part II of the Code after declaring to the Operations Manager, the Chief Pilot and the Flight Attendant colleague that she was refusing to fly because the aircraft was unsafe without identifying in any specific way what the ground of her refusal was.

The Board notes that for such a complaint to be valid the complainant must comply with section 128(6); in addition, there is a requirement for an employee to make it reasonably and sufficiently clear what the basis of the safety concern really is. The Board, having reviewed the sequence of events, the actions of the complainant and those of the employer, determines that the complainant failed to meet the aforementioned requirements and accordingly dismisses the complaint.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

RÉSUMÉ

Sheila Green, plaignante, et Air Niagara Express Inc., employeur.

Dossier du Conseil: 950-229

Décision n° 983

La décision qui suit porte sur une plainte fondée sur le paragraphe 133(1) alléguant violation de l'alinéa 147a) du Code. La plaignante, qui occupe un poste d'agent de bord en chef pour l'employeur, allègue que celui-ci a enfreint l'alinéa 147a) en la congédiant parce qu'elle avait exercé son droit de refuser d'effectuer du travail dans des conditions qu'elle jugeait dangereuses.

L'employeur prétend que la plaignante a refusé d'assumer les responsabilités qui lui incombent aux termes de la Partie II du Code, après qu'elle eut déclaré au directeur des opérations, au pilote en chef et à sa collègue agent de bord qu'elle refusait de travailler parce que les conditions à bord de l'avion étaient dangereuses, sans donner plus de précisions.

Le Conseil remarque que pour qu'une telle plainte soit valide, les plaignants doivent se conformer au paragraphe 128(6). En outre, les employés doivent expliquer de façon raisonnable et claire les raisons qu'ils invoquent en matière de sécurité. Ayant examiné la suite des événements ainsi que les mesures prises par la plaignante et par l'employeur, le Conseil juge que la plaignante n'a pas satisfait aux exigences susmentionnées et rejette donc la plainte.



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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Sheila Green,
complainant,
and
Air Niagara Express Inc.,
employer.

Board File: 950-229

The Board consisted of Mr. J. Philippe Morneau, Vice-Chairman, and Mr. François Bastien and Ms. Mary Rozenberg, Members.

Appearances

Mr. Jan-Paul Waldin, accompanied by Mr. Peter Dmytriw, for Air Niagara Express Inc.; and
Mrs. Sheila Green, on her own behalf.

These reasons for decision were written by
Ms. Mary Rozenberg, Member.

I

This complaint was filed with the Board on March 16, 1992 pursuant to section 133(1) of the Canada Labour Code (Part II - Occupational Health and Safety) alleging violation of section 147(a) of the Code.

The complainant, Sheila Green, alleges that the respondent employer, Air Niagara Express Inc. (Air Niagara), violated section 147(a) of the Code by terminating her employment for having exercised her right to refuse to perform work in conditions she considered unsafe and a danger to her health.

According to Mrs. Green, she had refused to work on March 1, 1992 because of breathing problems February 21, 1992, while performing regular flight attendant duties for Air Niagara. These breathing problems interfered in her ability to perform her duties in a safe and comfortable environment and out of concern for her well-being.

Mrs. Green further alleges that the pilot was negligent in his duties on February 21, 1992 as he is the one who must advise crew members whenever altitudes that could require oxygen-assisted breathing are to be attempted and is responsible for ensuring a readily available and adequate supply of oxygen.

Air Niagara denied the section 147(a) allegation and states that Mrs. Green was a probationary employee who could not make the grade and was therefore released for poor work performance, unacceptable behavior, and specifically her failure to identify safety hazards when she refused to work on an allegedly dangerous aircraft.

The Board heard the complaint in Toronto on May 4 and 5, 1992.

II

Sheila Green, who has worked continuously as a registered nursing assistant since she graduated in 1979, started flight attendant training with Air Niagara in November 1989. Upon completing her training, Mrs. Green worked for Air Niagara as a part-time flight attendant from December 18, 1989, and eventually as a full-time flight attendant from August 1, 1990 to August 11, 1991 when she resigned. Mrs. Green performed flight attendant duties for Air Niagara between August 11, 1991 and December 18,

1991 under an arrangement where she billed them for her services on a day-to-day basis. She was rehired as a full-time chief flight attendant on December 18, 1991 until her termination in March 1992.

Air Niagara is an airline company that provides group charters out of their base at Toronto's Lester B. Pearson International Airport using a Convair 580 aircraft.

III

The Facts

The flight that carried passengers from Toronto to St. Louis on February 21, 1992, was "ferried" on the return portion of the two-hour trip. A "ferried" flight means that the aircraft does not carry any passengers. During this "ferried" portion, flight attendants are expected to do cleaning chores. Captain Dave Newhook was the pilot of the Convair 580 aircraft, and Sheila Green and Fatima André were the senior and junior flight attendant respectively. Captain Newhook took the aircraft from 23 000 to 25 000 feet for about an hour. The interior cabin pressure was at 11 000 feet. The Board was told at the hearing that when the company's aircraft carry passengers, they never fly above 23 000 feet, and cabin pressure is set for 10 000 feet. The craft will fly over 23 000 feet to a maximum of 25 000 feet only when it is being "ferried" to take advantage of higher winds to save on fuel costs.

During this return flight, flight attendant Fatima André reported to her supervisor, Sheila Green, that she felt extreme tiredness and shortness of breath. Sheila Green went to the cockpit and asked the Captain for permission

to use the portable/therapeutic oxygen system. Oxygen is supplied either through a "fixed oxygen system" located behind the first officer's seat using overhead gas masks, or in portable bottles through a "therapeutic system" located in the front of the cockpit. She voiced her concern that she should not be asked to use oxygen, an objection she had raised on a previous flight, as she thought it an unacceptable procedure for the company to ask anyone to use oxygen so that the aircraft could fly above 23 000 feet.

The Captain told Mrs. Green to use the fixed oxygen system instead because of convenience (as the mask just plugs in). She returned to the cabin, and she and Ms. André put on their mask. Mrs. Green complained that the oxygen was not flowing properly. She then tried another mask. In both instances, the flow indicator showed a green light, which indicates that the apparatus is in working order, but she was still not satisfied. Although the Captain gave Mrs. Green permission to use the portable oxygen system if she wished, she continued using the fixed oxygen system for about 20 to 25 minutes, or about the same time period as did Ms. André. Ms. André told the Board that she, herself, felt that the oxygen system and the supply was adequate.

On February 26 and 27, 1992, Mrs. Green and Ms. André crewed a Toronto-Boston return run which Captain Newhook piloted. A preflight check brought attention to the flight oxygen bottles which registered 1 500 pounds per square inch (p.s.i.) instead of the required 1 800 p.s.i. The bottle was taken out and charged to the required 1 800 p.s.i. Mrs. Green did not complain about the oxygen supply or its availability on that flight. At Mrs. Green's request, Ms. André carried out the duties of

senior flight attendant during that flight. Mrs. Green felt that in view of her intention to launch a safety complaint, her role as a senior flight attendant would be wrongly perceived.

In response to Mrs. Green's attempts to have her concerns addressed, a meeting was arranged on February 28, 1992, by Peter Dmytriw, Operations Manager. Mr. Dmytriw, Captain Dave Newhook, Chief Pilot, and Sheila Green, Chief Flight Attendant, attended the meeting; Ms. André was absent. During the meeting, Mrs. Green stated that she found out that the Convair aircraft is certified to fly at 25 000 feet. Discussions ensued and it was agreed that, should the aircraft be ferried over 23 000 feet, the crew would be advised beforehand. At the conclusion of the meeting, Mr. Dmytriw and Captain Newhook understood that this course of action was acceptable to Mrs. Green, and considered that her concerns had been addressed. Mrs. Green's next scheduled flight was for March 1, 1992 at 7:00 a.m.

On February 29, 1992, the day after the meeting, Mrs. Green telephoned Mr. Dmytriw at home around 10:30 p.m. to say that she would not fly her scheduled flight (7:00 a.m., March 1, 1992) because the aircraft was unsafe. When Mr. Dmytriw asked her why the aircraft was unsafe, she did not give any particulars. He told the Board he put the question to her four or five times but to no avail. Upon concluding this telephone conversation with Mrs. Green, Mr. Dmytriw immediately telephoned Captain Newhook to ask him if he had any knowledge that the aircraft was unsafe, and if the aircraft was certified by the mechanics. Captain Newhook said that he had no knowledge of any deficiencies, and that the mechanical checks had not indicated otherwise.

He told Mr. Dmytriw that he would immediately call Sheila Green.

In the ensuing phone conversation with Mrs. Green, Captain Newhook indicated that there had not been any recorded defect, and that the aircraft was checked and certified as airworthy by maintenance personnel. Mrs. Green said that she was not happy with the oxygen system; that she did not feel the oxygen supply was safe; and that there were other things, but she did not want to get into those at that particular time.

Sometime during the evening of February 29, 1992, Mrs. Green made a phone call to her good friend and flight attendant colleague, Ms. André. The latter returned the call upon her arrival at home on March 1, 1992 at 2:30 a.m. Mrs. Green advised Ms. André that she would not be working the 7:00 a.m. flight on March 1, 1992 as she felt it was not safe to do so, but without specifying what was unsafe. Ms. André asked if anything had happened at the February 28 meeting, to which Mrs. Green said things had gone well.

Ms. André reported for work and discussed the matter with the first officer, Mr. Cochrane, who basically reiterated that the mechanics had certified the aircraft as airworthy. He added that as the craft had been sitting for a couple of days, there had been plenty of time to look after things if that was necessary. Ms. André was the sole flight attendant on the March 1, 1992 flight, with 40 passengers onboard (40 and less passengers require only one flight attendant; over 40 passengers require two flight attendants).

Mrs. Green contacted Howard Carter of Occupational Health

and Transportation Safety to file a report on March 2, 1992. According to the safety officer, she expressed concern for her safety as she thought the aircraft was not certified for flights at 25 000 feet; she also complained of a lack of oxygen and insufficient flow of oxygen through the various masks she had tried; she reiterated that in spite of the green flow indicator light, she was not convinced that the flow of oxygen was adequate. The safety officer testified that he reviewed the certification for the Convair aircraft type and carried out an on-site investigation on March 4, 1992. After testing the oxygen systems, he found that there was no danger to any member of the crew because the oxygen was adequate.

According to Mr. Carter, the February 28 meeting between Mrs. Green and her employer was an investigation as required by section 128(7) of Part II of Code. He considered that at the conclusion of that meeting, it was reasonable to believe that the employer was satisfied that Mrs. Green's concerns had been put to rest.

On March 9, 1992, Arie Tall, President of Air Niagara, attempted to reach Mrs. Green to discuss her concerns. She did not return his call.

On March 11, 1992, Howard Carter contacted Mrs. Green and advised her that there was no danger within the meaning of the Code, and that she should contact Air Niagara to reaffirm her willingness to return to work.

Mr. Tall again called Mrs. Green on March 12, 1992. A meeting was arranged for later that day. When Mrs. Green reported to his office for the meeting, she had a pad of

paper and pencil in hand and she stated "I'm here ready and willing to report to work." She had nothing to say about her work refusal. After this, Mr. Tall testified that he had advised Mrs. Green that she was no longer considered an employee of the company, and that any monies owing to her would be paid by the payroll department. He felt strongly that Mrs. Green's actions were irresponsible vis-à-vis her fellow employees, the company and the public at large in that she still refused to say what was unsafe about the aircraft. He indicated that in the airline industry, there is no room to treat safety in less than a totally responsible way as lives are at stake.

According to Mr. Dmytriw, after it was determined that the aircraft was safe, and after considering Ms. Green's behavior toward him, Captain Newhook, Ms. André and Mr. Tall, the conclusion was that Mrs. Green had made an irresponsible statement. Her employment ceased because Mrs. Green refused to perform her duties, because she refused to state what her concerns were, and because of her overall behavior. On March 13, 1992, Mrs. Green received a letter signed by Peter Dmytriw, advising her that because of her unacceptable behavior with senior management and the fact that her probation period was not complete, she was dismissed.

IV

The Arguments

Counsel for the employer submitted that the sole issue before this Board is whether the employer retaliated against Mrs. Green for exercising her right under section 128(1) of the Code. According to the employer,

Mrs. Green had neglected her own duties by not telling Mr. Dmytriw or Captain Newhook what was unsafe about the aircraft. To her colleague Ms. André, she would only say that she was refusing to fly because the aircraft was unsafe.

In essence, Mrs. Green indicated by her conduct: (i) that she was not going to fly; (ii) that she believed her life was at risk; (iii) that she refused to tell what the risk was. The employer insisted to know what the reasons were because it has a legal, statutory and moral duty to obtain that kind of information. In this situation, it was critical that Mrs. Green disclose the risk and her safety concerns to Peter Dmytriw, Dave Newhook and Fatima André. She was a part of the team, and in failing to fulfill that duty, she could no longer continue to be part of this flight crew. As such, she refused to discharge her responsibilities under Part II of the Code. To this day, she has failed to identify her concerns, and the employer had no other choice but to terminate her employment.

Mrs. Green, on her behalf, submitted that the concern she addressed to the pilot, Captain Newhook, was a safety-related one. She feels that Air Niagara wrongly dealt with things in that it had not adhered to proper safety procedures and guidelines. Although the situation was discussed and some recommendations were made, several concerns remained either wholly or inadequately addressed. She feels that Peter Dmytriw was too busy to investigate. He failed to respond, and her concerns had not been properly addressed.

The Decision

When employees allege that an employer has taken reprisals against them because they exercised their right to refuse under the Code, the Board must determine whether the employer's decision to discipline is related in any way to the employees exercising their right to refuse to work because they had reasonable cause to believe that there was a danger to themselves or to another employee. See Roland D. Sabourin (1987), 69 di 61 (CLRB no. 618); and Bruno Paquin (1991), as yet unreported CLRB decision no. 896.

The relevant sections 128(1), 128(6), 128(7), 133(1), 133(3), 133(6) and 147(a) read as follows:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee, the employee may refuse to use or operate the machine or thing or to work in that place.

the employee may refuse to use or operate the machine or thing or to work in that place.

...

(6) Where an employee refuses to use or operate a machine or thing or to work in a place pursuant to subsection (1), or is prevented from acting in accordance with that subsection pursuant to subsection (4), the employee shall forthwith report the circumstances of the matter to his employer and to

(emphasis added)

...

(7) An employer shall forthwith on receipt of a report under subsection (6) investigate the report in the presence of the employee who made the report and in the presence of

(a) at least one member of the safety and health committee, if any, to which the report was made under subsection (6) who does not exercise managerial functions;

(b) the safety and health representative, if any; or

(c) where no safety and health committee or safety and health representative has been established or appointed for the work place affected, at least one person selected by the employee.

...

133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

...

133.(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128 (6) or 129 (1) in relation to the matter that is the subject-matter of the complaint.

133.(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147 (a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party. R.S., 1985, c. L-2, s. 133; R.S., 1985, c. 9 (1st Supp.), s. 4.

147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

(i) has testified or is about to testify in any proceeding taken or inquiry held under this Part,

(ii) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the safety or health of that

employee or any of his fellow employees, or

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."

Section 133(6) of the Code imposes the burden of proof on the employer to satisfy the Board that its reasons for taking a particular action had nothing to do with the employees exercising their rights under the Code. See Bruno Paquin, supra.

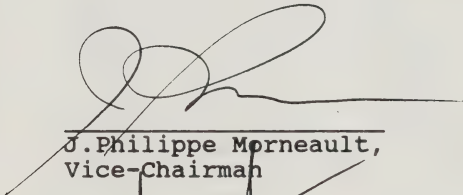
For such a complaint to be valid, by virtue of section 133(3), supra, the complainant must have complied with Section 128(6), Part II of the Code. See Don Koski (1992), as yet unreported CLRB decision no. 950. This section sets out the employees' right to refuse as well as their obligations. When employees exercise the right to refuse, the circumstances giving rise to the refusal must be reported to the employer. The reason for this is to provide a mechanism whereby the employees' concerns can be investigated, and where necessary, steps taken to alleviate the danger. See Brad Murray (1991), as yet unreported CLRB decision no. 864.

Mrs. Green stated that she would not fly because she felt the aircraft was unsafe, she did not specify what her safety concern was. The Code does not describe a formal process or the exact words the employees must use to invoke their right to refuse unsafe work, however it does contain a requirement for employees to make it reasonably and sufficiently clear not only that some safety concern is the basis of the refusal, but also what the safety concern is. Reasonable and sufficient clarity is missing in this case. See Paul Laprise (1990), 80 di 137; and 13 CLRBR (2d) 151 (CLRB no. 793); Bruno Paquin, supra; John Charters et al. (1989), 76 di 188; and 3 CLRBR (2d) 253

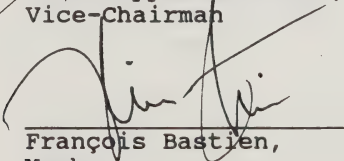
CLRBR (2d) 253 (CLRB no. 727). The employer immediately investigated on February 29, 1992. There was no readily identifiable danger present.

The Board has thoroughly examined the full sequence of events and the actions of the complainant and those of the employer. The evidence reveals that it was not unreasonable for the employer to believe that Mrs. Green's concerns up to February 28, 1992 had been addressed and put to rest at the meeting with Mr. Dmytriw and Captain Newhook. Furthermore, Mrs. Green was asked repeatedly on February 29, 1992, what her specific safety concern was. Not only did the employer's questions go unanswered, but so did her good friend's Ms. André. By virtue of section 133(3), Mrs. Green is not entitled to make a complaint to the Board because she failed to report the circumstances of her refusal to her employer as required by section 128(6).

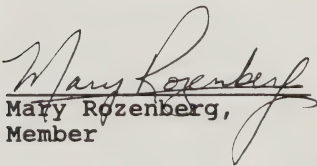
Based on all of these considerations, the Board accordingly dismisses the complaint. This is a unanimous decision of the Board.



J. Philippe Morneau,
Vice-Chairman



François Bastien,
Member



Mary Rozenberg,
Member

DATED at Ottawa this 18th day of December, 1992

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SummaryRésumé de Décision

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 348,
APPLICANT, AGT LIMITED, EMPLOYER,
AND ALBERTA TELECOMMUNICATIONS
MANAGERS ASSOCIATION, INTERESTED
PARTY.

FRATERNITÉ INTERNATIONALE DES
OUVRIERS EN ÉLECTRICITÉ, SECTION
LOCALE 348, REQUÉRANTE, AGT LIMITED,
EMPLOYEUR, ET ALBERTA
TELECOMMUNICATIONS MANAGERS
ASSOCIATION, PARTIE INTÉRESSÉE.

Board Files: 555-3433
555-3448

Dossiers du Conseil: 555-3433
555-3448

Decision No.: 984

Décision n°: 984

These reasons deal with the issue of
whether employees in certain
occupational classifications that
have been included in an appropriate
bargaining unit can express their
wishes whether to be represented by a
trade union separately from the
others in the unit.

Les présents motifs traitent de la
question de savoir si les employés de
certaines catégories professionnelles
qui ont été inclus dans l'unité de
négociation jugée habile à négocier
peuvent exprimer leurs désirs d'être
représentés par un syndicat
séparément des autres membres de
l'unité.

This issue arose in two applications
for certification which were filed by
the applicant trade union which was
seeking certification under the Code
to represent two bargaining units of
employees whom the union had
represented for many years under
provincial jurisdiction. In
determining the appropriate
bargaining units the Board included
certain occupational groups that were
not previously represented. The
employees in these classifications
sought a separate vote to determine
their wishes.

La question a été soulevée dans deux
demandes d'accréditation présentées
par le syndicat requérant qui
cherchait à être accrédité en vertu
du Code à l'égard de deux unités de
négociation d'employés que le
syndicat avait représentées pendant
de nombreuses années en vertu d'une
accréditation provinciale. En
établissant les unités de négociation
habiles à négocier, le Conseil a
inclus certains groupes
professionnels qui n'étaient pas
représentés auparavant. Les employés
ont demandé qu'un scrutin distinct
soit tenu pour déterminer les désirs
de ces groupes.

In its reasons, the Board first
touches briefly upon its
constitutional jurisdiction over the
operations of the employer and also
discusses its duty to certify trade
unions under the provisions of
Section 28 of the Code based upon the
majority wishes of the whole
bargaining unit. Majority views of
groups of employees in occupational
classifications within the overall
unit are not determinative of
anything.

Dans ses motifs, le Conseil examine
brièvement la compétence
constitutionnelle qu'il a à l'égard
des activités de l'employeur et
explique ensuite son devoir
d'accréditer les syndicats en vertu
des dispositions de l'article 28 du
Code en se fondant sur les désirs de
la majorité des membres de l'ensemble
de l'unité de négociation. L'opinion
de la majorité des groupes d'employés
de diverses catégories
professionnelles au sein de l'unité
n'est pas significative.

In the circumstances the Board denied the request for separate determination of the wishes of the employees in the classifications in question and certified the union as the bargaining agent in both applications. Employee wishes were determined by way of membership in the union as of the date of the filing of each application.

Dans les circonstances, le Conseil refuse la demande de tenir des scrutins distincts pour déterminer les désirs des employés des catégories en cause et accrédite le syndicat à titre d'agent négociateur dans les deux demandes. Les désirs des employés ont été établis en se fondant sur le nombre d'employés qui étaient membres du syndicat à la date de chaque demande.

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**CLRB REASONS FOR DECISION ARE NOW AVAILABLE
ON QUICKLAW.**

**LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.**

Reasons for decision

International Brotherhood
of Electrical Workers,
Local 348,

applicant,

AGT Limited,

employer,

and

Alberta Telecommunications
Managers Association,

interested party.

Board Files: 555-3433
555-3448

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Mr. Murray D. McGown, Q.C., for the applicant;

Mr. Gavin Hume, for the employer; and

Mr. Gordon R. Meurin, for the interested party.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with two applications for certification wherein the International Brotherhood of Electrical Workers, Local 348 (the IBEW or the union) seeks bargaining agent status under the Canada Labour Code (Part I - Industrial Relations) to represent employees working in craft, clerical and traffic

occupational groups at AGT Limited (AGT or the employer). The applications which were filed with the Board on March 17, 1992 and April 15, 1992 were basically not opposed by AGT except for one issue that went to the wishes of certain employees. This issue was raised by some employees who are affected by the applications as well as by the Alberta Telecommunications Managers Association (the Association) which claimed to represent some if not all of the employees who had registered their objections to being included in the bargaining units proposed in the applications.

The unusual feature about these applications is that the union already represents the vast majority of the employees in the affected occupational groups for collective bargaining purposes and has done so for many years. They obtained their original bargaining rights through the Alberta Labour Relations Board and, following decisions of the Federal Court of Appeal and of the Supreme Court of Canada, which we will touch upon briefly in a moment, AGT was found to be a federal undertaking falling under the heading in section 92(10)(a) of the Constitution Act, 1867. The provincial bargaining rights held by the IBEW consequently fell by the wayside and the union is now attempting to obtain formal certified bargaining agent status under the Code.

Following months of written submissions by the parties, the issues in these two applications have been reduced to the single question of whether certain employees in occupational groups who were not previously represented by the IBEW should have an opportunity to indicate their wishes as to whether

they should be represented by the union by way of a representation vote. As we said, this issue was raised by many of the employee intervenors and it was supported by the Association as well as by the employer.

II

Before addressing this issue, it is appropriate to record some brief background information going to the Board's jurisdiction over the labour relations of the employer. If nothing else, this will at least put these applications in their proper perspective.

As indicated, the IBEW and the employer, who was previously known as the Alberta Government Telephone Commission conducted their collective bargaining within the jurisdiction of the Province of Alberta. The employer was then a provincial crown corporation. In proceedings which were unrelated to labour relations, the Federal Court, Trial Division, per Madame Justice Reed, ruled that the employer was a federal undertaking (see Re Alberta Government Telephones v. Canadian Radio-Television and Telecommunications Commission et al. (1984), 15 D.L.R. (4th) 515). Madame Justice Reed did, however, find that the employer, as a crown corporation, enjoyed Crown immunity from the federal statute in question.

This Crown immunity question went to the Federal Court of Appeal where it was determined that AGT had stepped outside its Crown purposes and had therefore lost its Crown immunity (see Re CNCP Telecommunications and

Alberta Government Telephones et al. (1985), 24 D.L.R. (4th) 608). The employer applied for and obtained leave to appeal this decision to the Supreme Court of Canada.

In the meantime, in response to two applications for certification by the IBEW in 1986 this Board took jurisdiction over the operations of the employer (see Alberta Government Telephones (1986), 66 di 145; 13 CLRBR (NS) 313 (CLRB no. 581)). The Board then proceeded to deal with the applications for certification and found that it was appropriate to issue three certification orders covering clerical, traffic and plant employees (see Alberta Government Telephones Commission (1989), 76 di 172 (CLRB no. 726)).

Almost coinciding with that decision by the Board, the Supreme Court of Canada handed down its decision on the Crown immunity issue ruling that AGT did indeed enjoy immunity vis-à-vis the provisions of the Code (see Alberta Government Telephones et al. (1989), 98 N.R. 264; and [1989] 2 S.C.R. 225)). The impact of this decision was that for labour relations purposes the employees were left in a void. As employees of a federal undertaking, they could not be affected by the Alberta Labour Relations Act, nor, according to the Supreme Court of Canada, were they affected by the Code. Consequently, the Board dismissed the IBEW's applications for certification.

According to the information before the Board now, the employer is no longer a provincial crown corporation, therefore, there is no longer any question of Crown immunity. Apparently, in October 1990, under the

provisions of the Alberta Government Telephones Reorganization Act, S.A, 1990 Chapter A.23.5, all assets of the Alberta Government Telephones Commission were transferred to an entity named Telus Corporation (Telus). Telus became the parent company of the employer which is now known as AGT Limited. At the same time, all assets used in the principal business of telecommunications were transferred to AGT Limited. The outcome of all of this is that although the Province of Alberta is a major shareholder in Telus, which is a publicly traded company, neither Telus or AGT Limited are crown corporations.

In the circumstances, the employer and the union submit that this Board now has jurisdiction to deal with the labour relations of the employer. We agree and find that the operations of the employer do fall within section 92(10)(a) of the Constitution Act, 1867 and that AGT is a federal work, undertaking or business within the meaning of section 4 of the Code.

III

In the instant applications for certification the issue of the appropriateness of the bargaining units was not in dispute. The parties, meaning the IBEW and the employer, had on April 3, 1992, entered into a "Recognition Agreement" which identified four bargaining units which the parties had agreed are appropriate for collective bargaining. Two of these bargaining units, namely the "Craft Bargaining Unit" and the "Clerical and Traffic Bargaining Unit" are

those affected by these applications. They are described in the "Recognition Agreement" as:

"AGT LIMITED CRAFT BARGAINING UNIT

*All Craft and Services employees of AGT Limited whose core functions are to provide installation, repair, maintenance, construction or related services, including vehicle operations, building maintenance, warehousing or routine design work, but **excluding** foremen, supervisors and those above, and those whose core functions are marketing and sales, administrative, professional, technical, clerical or traffic duties."*

and

"AGT LIMITED CLERICAL AND TRAFFIC BARGAINING UNIT

*All Clerical and Traffic employees of AGT Limited whose core functions are to provide dining services, operator services for toll, directory or PABX services, carry out routine clerical, secretarial, stenographic, reception or drafting duties, customer service representation, service observation or phone center sales, but **excluding** executive secretaries and other secretaries engaged in confidential labour relations matters, supervisors and those above, and those whose core functions are marketing, telemarketing and sales, administrative, professional, technical or craft duties."*

After having considered the submissions of the union, the employer, and the association on this topic of appropriateness, as well as the letters and petitions from employees who contested their inclusion in the bargaining units, the Board decided to accept these "agreed to" bargaining units as the appropriate bargaining units for the purposes of these applications for certification. These units were clearly arrived at after consideration of the well established criteria which are set out in the Board's jurisprudence regarding appropriate units such as,

job content, function and interrelationship, administrative convenience of the employer and community of interest and the likes. The units are also designed in the generic form which is preferred by the Board.

It should, however, be made clear that while accepting these "agreed to" bargaining units as being appropriate for collective bargaining, it should not be inferred that the Board has ruled that all persons who have been left out of scope are necessarily not employees within the meaning of the Code or that they may not be appropriate for inclusion in these or any other bargaining unit. These questions were not raised nor were they addressed. They are left for another day if and when they arise.

IV

Having decided upon the appropriate bargaining units the next task for the Board is to satisfy itself as to the wishes of the employees in the bargaining units, which brings us to the issue that we identified earlier, i.e., should employees in certain occupational groups that were not previously represented by the union be permitted to express their wishes separately from the other employees in the units. These classifications are: Technician I, Technician II, and Display Technicians in the Craft Bargaining Unit; and Department Head Secretary, Regional Managers Secretary, Administrative Assistant, Graphic Artist, Display Artist, and Chief Coin Custodian in the Clerical and Traffic Bargaining Unit.

This aspect of the applications for certification is governed by section 28 of the Code which provides:

"Duty to certify trade union

28. Where the Board

(a) has received from a trade union an application for certification as the bargaining agent for a unit,

(b) has determined the unit that constitutes a unit appropriate for collective bargaining, and

(c) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,

the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit."

(emphasis added)

Clearly, the majority referred to in section 28(c) is a majority of the employees in the bargaining unit that has been determined to be appropriate for collective bargaining. Within that legislative scheme, the majority views of any particular occupational group is, therefore, not determinative of anything. Once the Board is satisfied that a majority of all of the employees in the overall bargaining unit wish to have the applicant trade union represent them as their bargaining agent, the Board is duty bound to certify the trade union as the bargaining agent for the bargaining unit.

In this regard, it is a long established practice of this Board to use membership in a trade union as an indication of a wish to be represented by a given

trade union. This practice has been embedded in the Board's Regulations:

"Evidence of Employees' Wishes

23. In any application relating to bargaining rights,

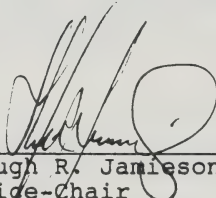
(a) membership of an employee in a trade union is evidence that the employee wishes to be represented by the trade union as that employee's bargaining agent; and

(b) membership in a trade union of a majority of employees in a unit appropriate for collective bargaining is evidence that the majority of the employees in the bargaining unit wish to be represented by the trade union as their bargaining agent."

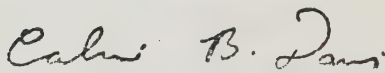
Applying these principles to the instant applications, it is clearly not an option for the Board to determine the wishes of the employees in the occupational classifications in question here separately from the other employees in the bargaining units that were determined to be appropriate. Also, the fact that these people were not previously represented by the union when the parties were conducting their labour relationship under provincial rules is not really an important consideration for the Board. It is not uncommon to find that legislation and also practices and policies of provincial labour Boards differ from those in the federal jurisdiction. This is particularly so when it comes to appropriateness questions such as inclusions and exclusions from bargaining units. In the circumstances here, the scope of the appropriate bargaining units were determined under federal rules and everyone who was included is bound by the wishes of the majority vis-à-vis representation by the IBEW.

According to the material before the Board, the vast majority of the employees in each of the two bargaining units wish to be represented by the IBEW for collective bargaining purposes. This wish has been determined by way of union membership as of the date the applications were filed. The Board is therefore duty-bound by virtue of section 28 of the Code to certify the union as the bargaining agent for these bargaining units and we so order.

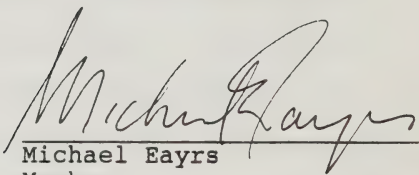
The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 22nd day of December 1992.

information

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SUMMARY

E.C. AUST, APPLICANT,
CANADIAN PACIFIC LIMITED,
EMPLOYER, AND TRANSPORT
CANADA, INTERESTED PARTY.

Board File: 950-226

Decision No.: 985

RÉSUMÉ DE DÉCISION

E.C. AUST, REQUÉRANT,
CANADIEN PACIFIQUE
LIMITÉE, EMPLOYEUR, ET
TRANSPORTS CANADA, PARTIE
INTERESSÉE.

Dossier 950-226

du Conseil
Décision n° 985

In this decision, a single member panel of the Board reviewed a safety officer's decision which had been referred to the Board pursuant to section 129(5) of Part II of the Canada Labour Code.

The employee who requested the referral of the decision claimed that a locomotive assigned to him for switching operations in rainy conditions was unsafe to operate because the condition of its wheels caused it to skid. The safety officer's decision that there was no danger within the meaning of the Code was confirmed when the Board satisfied itself that the wheels in question had been properly inspected and found to be in compliance with established Transport Canada regulations.

Dans la décision qui suit, un membre du Conseil siégeant seul a passé en revue une décision d'un agent de sécurité qui avait été renvoyée au Conseil aux termes du paragraphe 129(5) de la Partie II du Code canadien du travail.

L'employé qui a demandé le renvoi de la décision prétend que la locomotive qui lui a été confiée pour qu'il effectue des manoeuvres d'aiguillage, au cours d'une journée de pluie, était dangereuse, parce que les roues étaient dans un tel état que la locomotive dérapait. Étant convaincu que les roues en question avaient été bien inspectées et se conformaient aux règlements de Transports Canada, le Conseil a confirmé la décision de l'agent de sécurité selon laquelle il n'y avait pas de danger au sens du Code.

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**LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.**

Canada

Labour

Relations

Board

Conseil

Canadien des

Relations du

Travail

Reasons for decision

Mr. E.C. Aust,

applicant

and

Canadian Pacific Limited,

employer,

and

Transport Canada,

interested party.

Board File: 950-226

The Board was composed of Mr. Michael Eayrs, Member, sitting as a single member quorum pursuant to section 156(1) of the Canada Labour Code (Part II - Occupational Safety and Health).

Heard in Vancouver on July 9, 1992.

Appearances:

Mr. Mark A. Allen, and Mr. Earl C. Aust, for the applicant; and

Mr. Paul A. Guthrie, counsel, for the employer; and

Mr. M.M. West, Safety Officer, Transport Canada.

I

This is a referral of a Safety Officer's decision under section 129(5) of the Canada Labour Code (Part II - Occupational Safety and Health). That section provides as follows:

"129(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or

operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."

In this case, the employee, Mr. Earl C. Aust, an experienced Locomotive Engineer employed by Canadian Pacific Limited (CP Rail) invoked his right pursuant to section 128(1) of the Code, to refuse to operate the locomotive (DE1544) with which he was performing switching operations at CP Rail's Coquitlam yard in Port Coquitlam, B.C. on January 31, 1991. Mr. Aust claimed that the condition of the wheels on that locomotive caused skidding and unpredictable braking ability, thus causing potential danger to himself and other employees.

Section 128(1) provides as follows:

"128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee, the employee may refuse to use or operate the machine or thing or to work in that place."

CP Rail authorities conducted an inspection and pronounced the unit fit to remain in operation. Mr. Aust continued to be concerned and Mr. M.M. West of Transport Canada (a Safety Officer within the meaning of the Code) was called in; he promptly conducted an investigation involving Mr. Aust, Mr. Allen (BLE representative), Mr. Gosling (CP Rail) and Mr. Oliver (Alternate Safety and Health Committee representative). Following his investigation, Mr. West rendered a verbal decision to the effect that no danger, as defined in the Code, existed.

By letter dated February 4, 1992, the decision was confirmed in writing to Mr. Aust and by letter dated February 12, 1992, Mr. Mark Allen on behalf of Mr. Aust requested that the decision be referred to this Board.

At the Board's enquiry, the question of timeliness of the referral to the Board was raised by CP Rail; the same question had also been raised by the Safety Officer when complying with the request to refer his decision to the Board. Section 129(5) does state that a request such as this is to be made *"within seven days of receiving notice of the decision"*. It was made clear, however, that the parties wished the Board to proceed with and decide the matter. As it is not clear precisely when Mr. Aust received the Safety Officer's written decision, I assume, in the circumstances of this case, that the request was made in a timely manner and, will proceed to decide the matter.

II

The Safety Officer's written decision of February 4, 1992 reads in part:

"In this instance, my determination that no "danger" existed, as defined in the Canada Labour Code, is as follows:

This assignment works solely within yard limits and at a speed not exceeding 10 MPH.

The condemning limits for slid flats is covered by a separate regulation, however these limits were not exceeded.

The condition of the wheels was known in advance (from the MP 74).

The locomotive had been used without incident at least 3 shifts prior to Mr. Aust's shift.

The brake shoes, brake travel and independent brake pressure were all within prescribed specifications.

Considering the above, it is my decision that no danger existed as referred to in Section 128(1) (a) and (b) of the Canada Labour Code."

At the hearing, Mr. Aust told of the safety concerns leading to his refusal; namely, that flat spots (slid flats) on the wheels of locomotive DE 1544 caused reduced braking ability and unpredictable skidding when he applied the brakes to the locomotive itself, or to the locomotive when pulling a train of forty cars. His concerns with the locomotive's braking ability and the excessive noise and confusion, in his opinion, impaired his concentration on his work and caused him concern for the safety of his fellow workers.

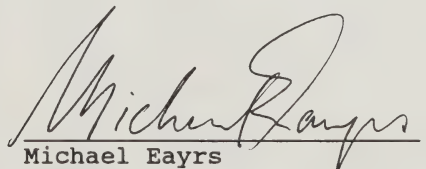
Mr. Allen, (Mr. Aust's representative at the hearing) had in fact operated the same locomotive on the previous day and, having experienced some skid problems, left a tag (known as an MP 74) on the unit notifying maintenance of a potential problem. At the Board's enquiry, Mr. Allen's primary concern with the Safety Officer's conclusion appeared to be that in the course of investigating the matter on January 31, the Safety Officer had not ordered or conducted a test of the locomotive while it was in motion.

Both CP Rail and the Safety Officer did, in fact, perform visual inspections of locomotive DE 1544 while it was stationary. The slid flats on the wheels were properly measured by prescribed methods and found to be within the limits permitted by both the pertinent CP Rail maintenance regulation and the applicable regulations under the National Transportation Act. Those regulations were made available to the Board at the enquiry.

Further, at the hearing, CP Rail advised that Mr. Aust, when moving the locomotive with cars attached, could have requested and would have been granted immediate permission to use the air braking capabilities of the cars. There was additional evidence that the unit was equipped with steel brake shoes which have better braking capability in the rain conditions which existed on January 31 than "composition" brake shoes. It was also noted that locomotive DE 1544 performed one or more shifts without incident, subsequent to January 31, and prior to being put in the shop for maintenance.

My conclusion in this case is that the Safety Officer did in fact carry out a prompt and proper investigation prior to his finding of "no danger" within the meaning of the Code. Most significantly, he performed the tests prescribed by established regulations and satisfied himself that the condition of the wheels in question conformed, in all respects, to those regulations.

Accordingly, the Safety Officer's decision in this case is confirmed.


Michael Eayrs
Member

ISSUED at Ottawa this 11th day of January 1993

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Summary

National Association of Broadcast Employees and Technicians, Chris Alders and Nancy Gillis, complainants, and Radio Atlantic (CKCL) Ltd., respondent employer.

Board File: 745-4163

Decision No.: 986

The National Association of Broadcast Employees and Technicians complained to the Board that Radio Atlantic (CKCL) Ltd. of Truro, Nova Scotia, had breached sections 94(1)(a), 94(3)(a)(i) and (iii) of the Canada Labour Code (Part I - Industrial Relations) when it laid off two junior employees.

The Board determined that, although certain short and passing comments of an anti-union nature were made by the general manager of the Truro radio stations after he had made reference to the lay-offs and had announced that owners were planning to try to sell the Truro stations, as well as others in Fredericton and Bathurst also owned by Radio Atlantic Holdings, the comments were purely personal. The Board found that the decisions to lay off and to sell had been made by the general manager's superiors, that he had had nothing to do with them and was only the messenger. He was, in fact, forced by his superiors to apologize in writing for what he had said.

Résumé

Le Syndicat national des travailleurs et travailleuses en communication, Chris Alders et Nancy Gillis, plaignants, et Radio Atlantic (CKCL) Ltd., employeur intimé.

Dossier du Conseil: 745-4163

Décision n°: 986

Le Syndicat national des travailleurs et travailleuses en communication a déposé auprès du Conseil une plainte selon laquelle Radio Atlantic (CKCL) Ltd., Truro (Nouvelle-Écosse), avait enfreint l'alinéa 94(1)a) et les sous-alinéas 94(3)a)(i) et (iii) du Code canadien du travail (Partie I - Relations du travail), lorsqu'elle avait mis à pied deux employés ayant moins d'ancienneté.

Le Conseil a constaté que, bien que le directeur général des stations de Truro ait en passant formulé certains commentaires de nature antisyndicale après qu'il eut fait référence aux mises à pied et annoncé la vente possible des stations de Truro, de même que des stations de Fredericton et Bathurst, qui appartiennent à Radio Atlantic Holdings, ces commentaires étaient strictement subjectifs. Le Conseil a jugé que les décisions de mettre des employés à pied et de vendre les stations avaient été prises par les supérieurs du directeur général, que ce dernier n'avait eu rien à dire et qu'il n'était que le messenger. En fait, ses supérieurs l'avaient obligé à s'excuser par écrit de ses propos.

The decisions were motivated
only by business
considerations. The Board
dismissed the complaint.

Les décisions n'ont été
motivées que par des facteurs
d'ordre économique.
Conseil a rejeté la plainte

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Reasons for decision

National Association of
Broadcast Employees and
Technicians, and Chris
Alders, and Nancy Gillis,

complainants,

and

Radio Atlantic (CKCL) Ltd.,

respondent employer.

Board File: 745-4163

The Board consisted of Vice-Chairman Thomas M. Eberlee and
Members Calvin B. Davis and Robert Cadieux.

Appearances:

Mr. Raymond Larkin, for the complainant;
Mr. John F. Eddy, for Radio Atlantic (CKCL) Ltd.

These reasons for decision were written by Mr. Thomas M.
Eberlee, Vice-Chairman.

I

Chris Alders and Nancy Gillis were employees of Radio
Atlantic (CKCL) Ltd. The National Association of Broadcast
Employees and Technicians (NABET) had recently been
certified by the Board as bargaining agent for a unit of
employees which included Mr. Alders and Ms. Gillis. Both
were laid off effective January 1, 1992. NABET complained
to the Board on February 10, 1992 that they were terminated
as a result of their union activities, in violation of
sections 94(1)(a) and 94(3)(a)(i) and (iii) of the Canada
Labour Code (Part I - Industrial Relations). These
sections read as follows:

"94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

...

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

...

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part, ..."

The union also alleged that the terminations of Mr. Alders and Ms. Gillis constituted alterations in terms and conditions of work, contrary to section 50 of the Code. It also claimed that the employer's stance during collective bargaining was unfair and in contravention of section 50. The alleged violations of section 50 were not before the Board when it heard the case in Halifax on October 27, 1992 because the consent required from the Minister under section 97(3) had not been granted. The hearing therefore focused only on the alleged violations of sections 94(1)(a) and 94(3)(a)(i) and (iii).

II

Most of the story is reasonably straightforward. Radio Atlantic (CKCL) Ltd. operates radio stations CKCL-AM and CKTO-FM out of Truro, Nova Scotia. It is owned by Radio Atlantic Holdings Ltd. which also owns and operates CFNB, Fredericton, New Brunswick, and CKBC, Bathurst. Until October 1991, the headquarters of Radio Atlantic Holdings Ltd. was located in Bedford, Nova Scotia, in premises that also housed Radio Atlantic Publishing and R.A.P. Productions.

The Board has no reason to doubt the testimony of the current president of the holding company, John F. Eddy, that its various operations had fallen on extremely difficult economic times. One result of this was that the Bedford operations had to be closed; all headquarters personnel, some 25 employees, or one-quarter of the whole Radio Atlantic Holdings staff, were laid off. The headquarters was relocated to Fredericton.

The president at the time was Dan Somers. From mid-August of 1991, or before, it was planned that Mr. Eddy would take over the job as of January 1, 1992. Mr. Somers actually left the presidency in mid-December.

Mr. Eddy told the Board that during 1991, the company lost a very substantial sum of money; further losses were in prospect. The owners, of which he was one, decided to put the company up for sale. This required the approval of the Canadian Radio-Television and Telecommunications Commission, which is a process of about a year's duration. Meanwhile, the company had to reduce its costs as much as

possible in order to survive and keep operating until a buyer could be found and approval for the sale could be obtained.

NABET was certified by the CLRB on August 13, 1991, to be bargaining agent for a unit of employees of Radio Atlantic (CKCL) Ltd. working for the two radio stations at Truro. Meetings were held by the parties thereafter to negotiate a first collective agreement.

On November 19, 1991, they met in Truro and the union presented its proposals. Mr. Eddy testified that the intention was also for Mr. Somers to tell the union committee that he would be leaving the company, that Mr. Eddy would be taking over, that cost-cutting measures had been put into effect and more would have to follow and that the company was for sale.

Instead of making the foregoing announcement to the full union committee, Mr. Somers met privately with Barney Dobbin, one of NABET's Atlantic area representatives, and told him what was planned. They agreed that they would return to the negotiating session and Mr. Somers would tell the union committee that lay-offs were necessary at Truro, Fredericton and Bathurst in order to cut costs. No mention would be made then of Mr. Somers' impending departure or of the plan to sell the company.

Mr. Somers did as they had arranged. It was then agreed between him and the union representatives that the Truro lay-offs, involving two persons, would be handled in accordance with the lay-off provision in the draft collective agreement proposed by the union. Mr. Dobbin and the employee members of the union's negotiating committee

accepted the company's decision to lay off two of the most junior employees. While no names were apparently mentioned, the testimony suggests that those present understood to whom the lay-offs would be applied.

On November 22, Mr. Alders and Ms. Gillis were each and separately summoned to the office of Roy Publicover, vice-president and general manager of the Truro radio stations, and given a letter, signed by him, which advised of their terminations effective January 1, 1992. The Board was told, and has no reason to doubt, that the decision to lay off two employees at Truro and others at the company's Fredericton and Bathurst radio stations was taken by head office and that Mr. Publicover personally had nothing to do with it, except perhaps to identify the persons who met the criteria agreed upon by Mr. Somers and the union. The notices he gave to Mr. Alders and Ms. Gillis were authorized by Mr. Eddy at head office, although he had signed them. The evidence indicates that the company, in choosing Mr. Alders and Ms. Gillis to be the persons laid off, complied with the union's proposal in the draft collective agreement, respecting the implementation of lay-offs. So far, so good.

A few minutes after advising the two employees of their terminations. Mr. Publicover, again following instructions from head office, called a staff meeting. He read to the assembled 12 or so employees a press release dated the same day which announced that the company was seeking to sell its "radio broadcasting assets".

In his testimony, Mr. Publicover stated that he made no reference to the lay-offs during the staff meeting. Dale Lyon, an employee who had been a leader in the union's

original organizing campaign, told the Board that Mr. Publicover did precede his reading of the press release by making reference to the lay-off of two persons at Truro and others at Fredericton and Bathurst and to a plan to reduce office hours at Bathurst. Ms. Gillis, one of those laid off, was also at the meeting, but she did not remember whether Mr. Publicover mentioned the lay-offs.

Mr. Lyon remembered Mr. Publicover saying something to the effect that the company's various dealings with NABET had cost it \$40,000 to date. Ms. Gillis recalled a statement along these lines by Mr. Publicover, except that the cost figure cited was \$20,000.

There was no dispute, even by Mr. Publicover, over his parting words to the gathering. He said, "I believe the straw that broke the camel's back was the unionization of this station". Mr. Lyon shot back that this was an unfair assessment and simply not true. Mr. Publicover said nothing more and left the meeting immediately. However, witnesses heard Blair Dagget, a member of management, say that this sentiment was shared by the owners of the company. Mr. Lyon testified that he left the meeting with the message that there would have been no lay-offs and no decision to try to sell the company if the employees had not chosen to be unionized. The meeting lasted five or six minutes.

Mr. Lyon telephoned Mr. Dobbin, who was in Halifax, and told him about Mr. Publicover's statement. He did not tell Mr. Dobbin about the follow-up remark by Mr. Dagget until almost a week later.

After speaking to Mr. Lyon, Mr. Dobbin sent the following

letter (Exhibit 3) to Mr. Somers, dated November 25, 1991:

"At our last meeting on Tuesday, November 19th, we committed not to file unfair labour charges in response to your laying off two Truro employees.

We offered this commitment based on your assurance that the purpose of these lay offs were to alleviate, in part, the company's financial difficulties.

I wish to inform you, by way of this letter, that we are no longer able to honour this commitment and to advise you that if these lay off notices are not rescinded, and the two individuals' employment assured, that we will pursue the matter with the Canada Labour Relations Board.

For your information, our change of position is due to Mr. Publicover's statements to the employees on Friday, November 22nd, where he suggested that the reason for these lay offs was the employees' actions in organizing themselves as NABET members."

He also telephoned Mr. Somers to complain. Mr. Somers asked him whether, if they gave Mr. Publicover "a public flogging" for making the statement, this would settle the matter. Mr. Dobbin testified that Mr. Somers told him the statement was "just Roy" and did not represent the company's position regarding unionization.

On November 26, 1991, Mr. Publicover wrote the following letter (Exhibit 4) to Mr. Dobbin:

"I understand that at the Friday, November 22, meeting I made an injudicious comment to the effect that the recent organization of the employees may have been a factor considered by the present ownership in its decision to offer the company for sale.

This was an off-hand comment which to the best of my knowledge has no basis in fact. I am truly sorry for causing concern and upset with the union leadership and its membership.

I did not say, nor did I ever imply, the reason for layoffs of these two members was because of their affiliation with NABET or their activity

in organizing the work group.

The reason for their layoffs is known to staff and to their union representatives and is clearly the lack of financial resources to continue their employment.

In closing, I apologize for the inappropriate and inaccurate remark. Friday was a very emotional day for me."

He testified that he obtained Mr. Somers' approval for the text of the letter and he posted a copy of it on a bulletin board for all to see.

Then, Mr. Lyon reported to Mr. Dobbin the Dagget "addendum" to Mr. Publicover's statement. Some additional comment Mr. Publicover had also purportedly made later to somebody named Don Brown of Sydney, Nova Scotia, concerning the union, came to the ears of Mr. Dobbin. No evidence was adduced at the hearing concerning this alleged comment, although it was mentioned in the union's complaint. Mr. Dobbin sent the following letter (Exhibit 5) to Mr. Publicover, dated November 29, 1991:

"I am in receipt of your November 26th letter in which you suggest that your comments to employees at last Friday's meeting regarding the organizing efforts of the employees, as being a factor in the owners' decision to offer the Company for sale, were 'off-handed and injudicious.'

We were impressed with your sincerity and were prepared to accept your apology until we realized, through comments made by Don Brown in Sydney that you have been sharing your thoughts further-a-field than your Truro employees.

I have referred this matter to our legal counsel for their advice.

If you have any further explanation you wish to have considered, please forward same."

Mr. Publicover replied in the following letter (Exhibit 6), dated November 29, 1991:

"This will acknowledge receipt of your letter dated today.

In my discussion with Don Brown to which you refer, I solely stated to him that I had made an injudicious comment for which I had to apologize to the union.

That was the sum total of this discussion.

The apology I tendered was indeed sincere and I stand behind it."

Mr. Dagget no longer works for Radio Atlantic. The Board was told that before he left he was reprimanded for the comment he made on November 22, 1991.

The incident does not seem to have bothered the union very much, if at all, until after a negotiating session on January 25, 1992 which produced no results in the direction of concluding a collective agreement. Indeed, the evidence suggests that the Publicover and Dagget statements were not even mentioned by either party at the abortive negotiating meeting on January 25. It appears to the Board that the union then decided to gather together all that it had against the company, including allegations of failure to bargain in good faith, plus the Publicover incident which had happened two months earlier and had not been mentioned again, in order to file a complaint and bring pressure on the company to bargain a deal. As has been mentioned earlier, the Minister had not given consent to the union to complain concerning the actual bargaining process, so the matter before the Board relates only to the real meaning and the effect of the Publicover/Dagget comments.

III

Following the lay-offs, the employer brought Ms. Gillis, who had been a continuity writer, back to work for

temporary periods to fill in in other jobs. Mr. Alders had been the junior news reporter; the Board was told that he, too, had been invited to work on a temporary or part-time basis on at least one occasion but had not been interested in what was offered.

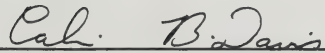
There is no doubt in the Board's mind that Mr. Publicover was not pleased when NABET organized the employees of the Truro radio stations. This is hardly an unusual viewpoint for any member of management in these not overly enlightened days. While Mr. Publicover may well be infected with the virus of "anti-union animus", and his comments at the short November 22 staff meeting show a tendency that way, the comments themselves cannot be taken as reflecting the motivation and rationale for the lay-offs and the announcement of the owners' decision to try to sell the Radio Atlantic business. The Board is inclined to judge Mr. Publicover's comments as being purely personal and "just Roy".

The decision to lay off staff and to put the radio station assets up for sale was taken, not by Mr. Publicover, but by his superiors at head office. It was purely a business decision. He was simply the messenger for, or the announcer of, that decision; however, he did what radio announcers are apparently not supposed to do: he allowed his personal feelings to become entangled in the message and, not surprisingly, it was misunderstood by the listeners.

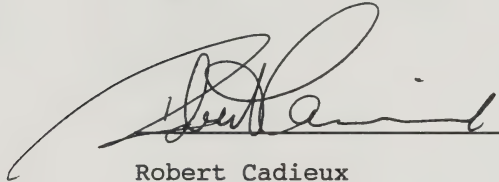
Based upon the facts as adduced in evidence, the Board has determined that the complaint must be dismissed.



Thomas M. Eberlee
Vice-Chair



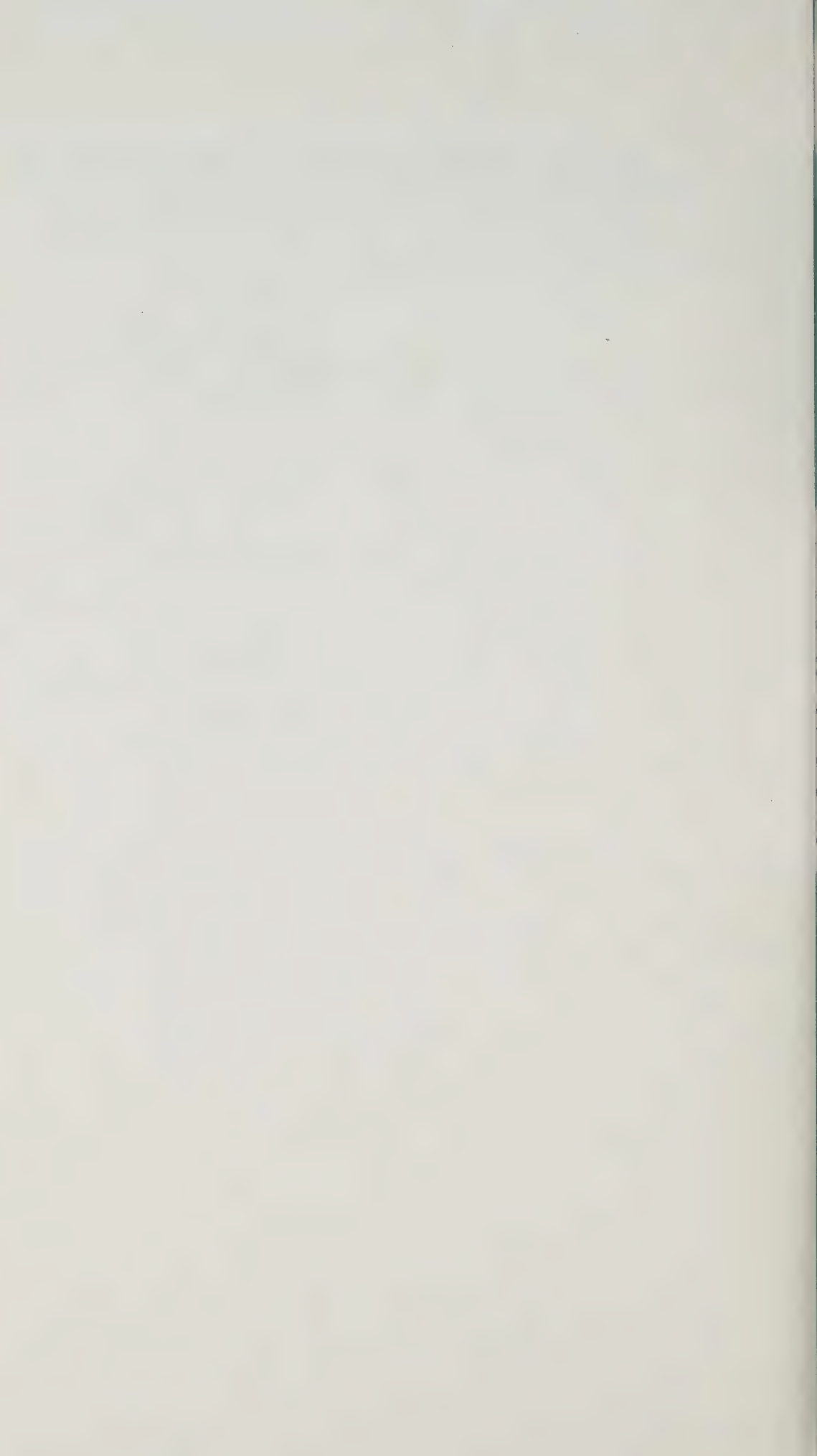
Calvin B. Davis
Member of the Board



Robert Cadieux
Member of the Board

ISSUED at Ottawa, this 19th day of January 1993.

CLRB/CCRT - 986



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SUMMARY

United Food and Commercial Workers International Union, Local 301W, complainant, Transport de l'Est Inc., respondent, and Association des travailleurs de Transport de l'Est Inc., mis-en-cause.

Board Files: 745-4288
555-3439
555-3449

Decision No. 987

This matter deals with a complaint of unfair labour practice relating to two competing applications for certification filed with the Board in April 1992. Both applications showed majority support. The United Food and Commercial Workers International Union, Local 301W (UFCW), alleged that Transport de l'Est Inc., the employer, contravened section 94(1) of the Canada Labour Code by participating in the formation of a rival organization, i.e. the Association des travailleurs de Transport de l'Est.

The evidence revealed that management was promptly made aware of UFCW's organizing meeting and that a tense atmosphere followed, a situation further fueled by word that work on the cooling systems had stopped at the plant. In addition, three employer representatives took part in the rival

RÉSUMÉ DE DÉCISION

Syndicat international des travailleurs et travailleuses unis de l'alimentation et de commerce, section locale 301W, plaignante, Transport de l'Est Inc., intimée, et Association des travailleurs de Transport de l'Est Inc., mise en cause.

Dossiers du Conseil: 745-4288
555-3439
555-3449

Décision n° 987

Il s'agit d'une plainte de pratique déloyale liée à deux demandes d'accréditation présentées devant le Conseil en avril 1992; toutes deux sont appuyées par une majorité d'employés. La section locale 301W de l'Union internationale des travailleurs et travailleuses unis de l'alimentation et du commerce (TUAC) allègue que l'employeur, Transport de l'Est Inc., a contrevenu au paragraphe 94(1) du Code canadien du travail lorsqu'il a participé à la formation d'une organisation rivale, soit l'Association des travailleurs de Transport de l'Est.

La preuve révèle qu'immédiatement après la réunion d'organisation des TUAC un climat tendu s'est installé, climat encore aggravé par la nouvelle de l'arrêt des travaux liés aux systèmes de réfrigération de l'entreprise. Trois représentants de l'employeur ont également

Association's meeting. In the following week, three long-standing problems raised at that meeting were solved. A few days later, work on the cooling systems resumed.

participé à la réunion de l'Association rivale. Au cours de la semaine suivante, trois problèmes anciens soulevés lors de cette rencontre ont été réglés. Les travaux liés aux systèmes de réfrigération ont repris quelques jours plus tard.

The application of the Code and the case law to the above circumstances led the Board to conclude that the employer had, over the relevant period, engaged in activities that supported the formation of the Association and undermined the other union thereby violating the provisions of paragraph 94(1) of the Code.

L'application du Code et de la jurisprudence aux faits de l'espèce amène le Conseil à conclure que l'employeur a, au cours de la période pertinente, posé des gestes qui ont favorisé la formation de l'Association et nuï au syndicat ce qui constitue une contravention aux dispositions du sous paragraphe 94(1)a) du Code.

Further, the Board dismisses the certification application of the Association on the ground that it is a dominated or influenced trade union within the meaning of sub-section 25(1). Consequently, the Board declares null and void the membership support given to the Association by the employees, and will issue the UFCW's local a certification order, as the certification requirements set out in the Code were met at the time it filed its application.

En outre le Conseil rejette la demande d'accréditation de l'association parce que cette dernière est un syndicat dominé ou influencé par l'employeur au sens du paragraphe 25(1) du Code. Le Conseil délivrera un certificat d'accréditation en faveur des TUAC, puisque ce syndicat satisfaisait, au moment du dépôt de sa demande, aux exigences du Code en matière d'accréditation.

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Reasons for decision

United Food and Commercial
Workers, Local 301W,

complainant,

and

Transport de l'Est Inc.,

respondent,

and

Association des travailleurs
de Transport de l'Est,

mis-en-cause.

Board Files: 745-4288
555-3439
555-3449

The Board was composed of Mr. J. Philippe Morneault, Vice-Chairman, and Mr. François Bastien and Ms. Ginette Gosselin, Members.

Appearances

Mr. Claude G. Melançon, for the complainant;

Mr. Philippe Garceau, for the Association des travailleurs de Transport de l'Est; and

Mr. Harold Dizgun, for the employer.

These reasons for decision were written by Ms. Ginette Gosselin, Member. In these reasons, the Board disposes of the above-mentioned three files.

I

The Board has before it a complaint filed on July 8, 1992 by the United Food and Commercial Workers, Local 301W (the UFCW or the union). In this complaint, the union alleges that the respondent, Transport de l'Est Inc. (the employer), contravened the provisions of section 94(1) of the Canada Labour Code by participating in the formation of the mis-en-

cause Association des travailleurs de Transport de l'Est (the Association) during the UFCW's campaign to organize the employees of Transport de l'Est Inc. The complainant is therefore asking the Board to dismiss, pursuant to section 25(1) of the Code, the application for certification filed by the Association.

This complaint is related to two applications for certification filed with the Board in April 1992 (555-3439 and 555-3449), both supported by a majority of employees. Consequently, the Board conducted a representation vote among these employees on September 2 in Montréal and on August 27 in Ottawa. Following receipt of the complaint, the Board ordered that the ballot boxes be sealed until it disposed of the complaint.

The employer denied having participated in the formation of the Association, and the latter denied collaboration by Transport de l'Est Inc. in its formation. Both asked the Board to dismiss the complaint.

A hearing was held in Montréal on September 8 and 9, 1992. At the complainant's request, the Board ordered that the witnesses be excluded. At the hearing, the union informed the Board that it was withdrawing from its complaint the allegation that the employer assisted financially with the formation of the Association.

Transport de l'Est Inc. is engaged in transporting goods by refrigerated trucks in Ontario and Quebec. The applications for certification that gave rise to this complaint cover its employees at the Montréal and Ottawa terminals, that is, 49 employees consisting of drivers, mechanics or warehousemen.

The employees were not previously organized.

The employer has had a health and safety committee for a number of years. Michel Raymond, a UFCW organizer, sits on that committee. A social club was founded in March 1990 by Jacques Hamel and J.M. Proulx. This club, membership in which is open to management and employees, organizes certain activities such as the Christmas Party. It had vending machines installed at the Montréal terminal and is responsible for stocking them. The club has 30 members, including Bernard Rioux, general manager of Transport de l'Est Inc. The membership fee is \$2 a month, and Jacques Hamel has been president of the club since its founding. Elections were announced every year since the club was founded, but were never held because no one has run for the various executive positions. This social club is not governed by any by-laws and does not keep minutes of its meetings. It does, however, keep certain accounting records. A shop committee was established in 1986. J.M. Proulx, M. Raymond, Daniel Déa and Jacques Hamel were its officers. The establishment of the social club apparently put an end to its activities.

On Monday, April 6, 1992, the union filed an application for certification with the Board. A meeting had been held on the previous Saturday at which the union had recruited the majority of its members. The employer was officially informed by the Board of the application for certification on April 8, 1992. On April 23, 1992, the Association also filed an application for certification to represent the same employees. In the meantime, the following events took place.

Testimony of Messrs. Raymond and Béchard

Michel Raymond and Stéphane Béchard, supporters of the UFCW,

testified that right from the beginning of that week, the atmosphere became tense at Transport de l'Est Inc.

According to Michel Raymond, two employees, Danny Lévesque and Stéphane Béchar, had spoken to him about the tension. The witness himself felt it acutely. The conversations were very short and took place in the work place. Michel Raymond felt too closely watched to talk in plain view of everyone. Jacques Hamel, who apparently got along well with manager Marcel Marceau, with whom he apparently talked daily, suggested to Michel Raymond that the employees ought to have formed a shop association instead of a union. On April 8 or 9, the work to modify the refrigeration equipment on the warehouse dock, work that had been going on for a number of weeks, was halted, and no explanation was given to the employees. Jacques Hamel suggested to Stéphane Béchar that the stoppage of work might be related to the UFCW's application for certification. This stoppage caused panic among the employees and rumours that the business was shutting down began to circulate. Another rumour, that Day & Ross in Toronto, a company associated with Transport de l'Est Inc., had shut down because the employees had unionized, lent weight to those rumours.

On Saturday, April 11, the employees held a meeting at the Ile Charron Hotel. Jacques Hamel was the principal organizer. That morning, the employees discussed the merits of unionization. The meeting was stormy. Some were worried about the future of the company, others about the fate of the UFCW organizers if the employees decided to form a shop association. At noon, all those in attendance had a free lunch at the hotel. The social club paid the hall rental fees and for the meals. When the meeting resumed early that afternoon, it elected a committee of five representatives, including Jacques Hamel, Danny Lévesque and Stéphane Béchar.

Then Marcel Marceau, Bernard Rioux, general manager of Transport de l'Est Inc., and Serge Duchaine, managing director of Day & Ross at Transport de l'Est Inc. and vice-president and general manager of operations at Day & Ross, came to meet with the employees. Invited by Jacques Hamel, they had first made an appearance in the morning, but those in charge of the meeting asked them to come back later because the employees had not finished their discussions. They listened, took note of the complaints aired by the employees regarding their working conditions, and Mr. Duchaine answered certain questions. When the employees asked if the UFCW's certification would result in the shut-down of the business, Mr. Duchaine said that he could not answer, but that it was up to the employees to make the best choice. In answer to a question from Michel Raymond, he said that there would be no reprisals against UFCW organizers if the employees opted for a shop union. After the employer representatives left, those in charge of the meeting circulated a sheet of paper that those who wished to resign from the UFCW were to sign. All employees present, save one, signed, including Michel Raymond. The meeting ended on that note. The following week, the atmosphere at work was not as tense. Problems the employees had raised with management at the Saturday meeting were resolved: excessive loads, the designation of supervisors and the operation of the health and safety committee.

Another meeting was held the following week, on April 18. This time a lawyer attended. At that meeting, the employees signed membership cards in the Association and paid the initiation fees. During the week, Jacques Hamel, J.M. Fleury and Stéphane Béchard had met with the lawyer to prepare for this second meeting. The following week, work on the refrigeration equipment resumed.

Testimony of J. Hamel

Jacques Hamel admitted that, beginning on Monday, April 6, the atmosphere at work was different. That day, some 40 employees spoke to him. He immediately talked of reviving the shop committee and making it a stronger organization capable of negotiating a collective agreement. He admitted saying that Marcel Marceau was probably not happy to learn that the employees were unionizing and suggesting to Stéphane Béchard that management might be shutting down the plant, although none of them had discussed this possibility with him. He said that he did not speak to the manager on April 6 or 7. A foreman explained to him that the work on the refrigeration equipment had been interrupted because a part was missing. He had not made this known to the employees because no one had asked him about it.

He organized the meeting on April 11. His objective was to get rid of the UFCW. Apparently with the approval of the shop committee, he invited management to this meeting. On the morning of April 11, he was asked to conduct the meeting in place of Michel Raymond, Stéphane Béchard and two other employees. He was then elected a member of the interim executive committee. He also called the second meeting. This time, the lawyer, Mr. Garceau, looked after payment of the hall rental fees.

Testimony of the Employer Representatives

Serge Duchaine and Bernard Rioux testified for the employer. Neither was in Montréal during the period in question; however, Mr. Duchaine was there for part of the day on April 6.

Mr. Duchaine learned from Bernard Rioux on Wednesday, April

8 that the UFCW had filed an application for certification. He knew nothing about it before that date. He immediately instructed management not to interfere in the procedure. He agreed to attend the meeting on April 11 because he had been told that operational problems would be discussed, but on the advice of his lawyer, he indicated that he would not talk about the union. As soon as he arrived at the meeting, he told the employees that he would not discuss this matter with them. The employees then aired a number of problems (10 in all) and wanted to hear his views on the union. He did not recall exactly what he said when the discussion turned to what choice the employees should make. He admitted that he may have said that they should make the right or the best choice. However, he recalled saying, in answer to someone who asked him how to get rid of the union, "You didn't ask me how to get in; don't ask me how to get out." The stoppage of work on the refrigeration systems was not discussed while he was present. Moreover, he was not aware of that situation. Finally, Mr. Duchaine denied making the remarks attributed to him by Messrs. Raymond and Bécharde during their testimony. He also denied that the companies for which he worked were opposed to the unionization of their employees, pointing out that Day & Ross in Toronto had not shut down and that the employees of Bel-Mont Transit belonged to a union affiliated with the CNTU.

Mr. Rioux learned on Wednesday, April 6 at 1:30 p.m. that an application for certification had been filed. He was in Trois-Rivières at the time. Jacques Hamel telephoned him on Thursday evening to invite him to the meeting on Saturday. Mr. Rioux warned him immediately that the union should not be discussed in their presence. Moreover, during that week, no one said anything to him about a deterioration of the atmosphere in the work place. He was the one who halted the work on the refrigeration equipment on April 9. He took that

decision while waiting for a guarantee from the company doing this work that the changes that it was proposing to the original plan would not affect the equipment's operation. This company, Nitrom Inc., had sent him the proposed changes to the plan on March 18. The witness told the Board that he received the written guarantee around April 21, but this second document was not submitted in evidence before us. In any case, the work resumed on April 22.

Mr. Rioux belonged to the social club in order to maintain contact with the employees. He was not involved in the administration of the club, but participated in one or two activities a year.

The Association did not present any oral evidence. It had provided, with its application for certification, the documents required by the Board and filed at the hearing, through its counsel, a copy of the constitution and by-laws it had adopted on April 18, 1992.

The Arguments of the Parties

The evidence, argued the applicant, showed that the employer, through its behaviour, had interfered in the choice made by the employees. It presented the following analysis of the facts. First, management used the social club and in particular Jacques Hamel, its president, as their channel of communication. He passed on their messages and, as president of the social club, had access to the money needed to launch the Association. Then came, at the appropriate time, the stoppage of work on the refrigeration system, and this work did not resume until after the Association had been duly formed. In the meantime, three employer representatives

agreed to participate in the meeting organized by Jacques Hamel, following which they resolved a number of problems raised by the employees at that meeting.

The applicant submitted that the signs which the Board identified in CJRC Radio Capitale Ltée (1977), 21 di 416; [1977] 2 Can LRBR 578; and 78 CLLC 16,124 (CLRB no. 89), as evidence of a union dominated or influenced by the employer were present in the instant case. There was rapid and effective recruitment by an independent association. The Association lacked financial resources, but nevertheless had quality legal assistance. Finally, the employer participated in some of the Association's activities.

The applicant therefore asked the Board to dismiss the Association's application for certification because the Association was a dominated trade union within the meaning of section 25(1). It also asked the Board to declare that the employer contravened section 94(1)(a).

The employer, for its part, argued that nothing linked it with the Association. Its representatives had not organized the April 11 meeting. They participated in it only at the invitation of an employee, solely to discuss operational problems, and that was what they did. It pointed out that the union's evidence concerning the tension in the work place was very weak and cast doubt on the credibility of Messrs. Raymond and Béchard. The employer also pointed out that no employee questioned the employer representatives during the meeting about the stoppage of work on the refrigeration system and concluded from this that the incident did not have the significance that Messrs. Raymond and Béchard attributed to it.

The employer submitted that the union's evidence did not meet

the Board's requirements regarding a contravention of section 94(1)(a). In support of this argument, it cited the following cases: National Bank of Canada (1982), 51 di 60 (CLRB no. 382); Bank of Nova Scotia, Selkirk, Manitoba (1978), 27 di 690; and [1978] 1 Can LRBR 544 (CLRB no. 123); City and Country Radio Ltd. (1975), 11 di 22; [1975] 2 Can LRBR 1; and 75 CLLC 16,171 (CLRB no. 46); and Air Canada (1976), 18 di 66; and 77 CLLC 16,062 (CLRB no. 70).

The Association also asked the Board to dismiss the complaint. It submitted that there was no direct or circumstantial evidence of the employer's participation in its formation. It also submitted that the fact that the employees did not question management at the meeting about the stoppage of work was revealing. It questioned the sincerity of Mr. Béchard who, after participating in the formation of the Association, testified on behalf of the union. Finally, the Association argued that the signs that constituted evidence of a dominated union, as determined by the Board in CJRC Radio Capitale Ltée, *supra*, could not be applied to the facts of the instant case. The Association noted in this regard that when the case law spoke of rapid recruitment, it meant recruitment done in one or two days, whereas in the instant case, it took two weeks to organize.

The Law and the Case Law

The relevant provisions of the Code are the following:

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ..."

The ban on interference by employers imposed by section 94(1)(a) is general and encompasses a wide range of situations. During a union organizing campaign, like the one in the instant case, this ban covers the situation where an employer tries to prevent any trade union from recruiting members among its employees (City and Country Radio, *supra*; Bank of Montreal, Tweed and Northbrook (1978), 26 di 591; and [1978] 2 Can LRBR 123 (CLRBR no. 124); American Airlines Incorporated (1981), 43 di 114; and [1981] 3 Can LRBR 90 (CLRBR no. 301); Bank of Montreal (Bank and Cecil Streets Branch, Ottawa) (1985), 61 di 83; and 10 CLRBR (NS) 129 (CLRBR no. 518); and National Mobile Radio Communications Inc. (1989), 79 di 11 (CLRBR no. 765)) or the situation where the employer expresses a preference for one of the trade unions that are simultaneously seeking the support of its employees (Air Canada (1976), 18 di 66; and 77 CLLC 16,062 (CLRBR no. 70); CJRC Radio Capitale Ltée, *supra*; and Ganeca Transport Inc. (1990), 79 di 199; and 90 CLLC 16,054 (CLRBR no. 780)).

In CJRC Radio Capitale Ltée, *supra*, the Board described the form that employer interference can take where two organizations are competing for the support of the same employees:

"Section 110(1) of the Canada Labour Code (Part V - Industrial Relations) establishes the right of an employee to join the trade union of his choice and to participate in its lawful activities. A trade union that has the support of a majority of the employees in an appropriate bargaining unit may be certified and thus acquire exclusive rights to bargain collectively with the employer on behalf of the employees in the said bargaining unit. At times, however, various tactics or strategies may be used to frustrate the exercise of these rights, even though these rights are recognized by the Canada Labour Code. It is for this reason that the Code contains provisions governing unfair practices.

In order to promote effective collective bargaining and to ensure the maintenance of industrial peace, the Canada Labour Code contains various provisions which apply when a trade union becomes the

bargaining agent for a group of employees. For instance, another trade union can make an application for certification only at certain times. Similar restrictions apply to the submission of an application for revocation. These provisions no doubt may tempt certain employers to thwart the unionization of their employees by creating 'paper unions' or 'paper associations'. Far from preventing the unionization of employees, they encourage it in such a way that a company union can be set up in the enterprise and avail itself of the protection offered by the provisions of the Code, thus preventing the certification of a genuine union. The use of such tactics is obviously prohibited, since it constitutes a veritable perversion of the provisions of the Code and thereby deprives employees of their rights under section 110(1) of the Canada Labour Code. ..."

(pages 431-432; 590-591; and 359-360)

In dealing with the same aspect of the question in Ganeca Transport Inc., supra, the Board, after addressing the issues of the neutrality required of an employer and the communications that are prohibited between it and its employees during a union organizing campaign, concluded as follows:

"... Similarly, the Board will examine generally the various aspects of an employer's conduct where two associations are seeking the support of its employees, in order to determine whether this conduct constitutes a contravention of the unfair labour practice provisions (see Graham Cable TV/FM (1986), 67 di 57; 14 CLRBR (NS) 250; and 86 CLLC 16,047 (CLRBR no. 588))."

(pages 212; and 14,461)

Finally, in dealing with section 94(1) complaints, it is not necessary to prove that the employer was motivated by anti-union animus. The text of section 94(1) does not allow this interpretation, and to have to adduce such proof would significantly reduce the scope of this provision in complaints alleging that the employer favoured one union over another. It must be proven that the employer, through deeds and words, interfered in the choice that its employees were preparing to make.

The application of the Code and past decisions to the facts of the instant case lead us to conclude that, during the period in question, the employer took actions that favoured the formation of the Association and harmed the union.

First, the evidence shows that management was quickly informed of the meeting held by the UFCW on April 4. Beginning the following Monday, April 6, the employees discussed this meeting in the work place. Jacques Hamel alone talked to some 40 employees. The meeting was therefore an open secret. A tense atmosphere developed immediately. The employer was not able to refute the evidence adduced by the union and corroborated by Jacques Hamel, organizer for the Association, of this atmosphere that enveloped the work place during the week of April 6 because its witnesses who testified at the hearing were not present in the work place during that period. Moreover, the employer did not call as witnesses its representatives who were in the work place during the period in question.

The following actions of the employer indicate to the Board how it assisted in the formation of the Association.

First, the employer halted the work on the refrigeration system. The evidence shows that the stoppage of work had a significant impact on the employees. The fact that the stoppage coincided with the filing of the application for certification heightened that impact. The employees concluded that the company might shut down. They discussed this possibility in the work place and at the first meeting held on April 11. This concern was expressed through questions on the possible shut-down. The employer's explanation regarding the timing of the stoppage and resumption of the work is incomplete and confused. It leaves us little choice but to conclude that the employer took these

decisions, at least in part, to influence the employees.

Second, there is the participation of three employer representatives in the meeting on April 11. Although they had probably cautioned the organizer that there could be no discussion of a union in their presence, the evidence shows that matter was discussed. Mr. Duchaine clearly recalled his answer to a question and also recalled saying that it was up to the employees to make a choice, although he did not recall his exact words. The Board accepts the testimony of the union's witnesses regarding the content of the exchanges between the employees and the employer representatives and concludes that these representatives spoke in favour of the Association. The Board also finds that this was not the innocent participation of an uninformed employer because Mr. Duchaine had consulted his lawyer beforehand.

Next, there is the resolution, during the week following the employer's participation in the meeting of April 11, of three problems raised by the employees at this meeting. The sudden resolution of these long-standing problems suggests that this gave added impetus to the movement to form the Association.

For these reasons, the Board concludes that the employer contravened section 94(1) of the Code.

Remedies

Where a section 94(1)(a) complaint is allowed, the Board has the following powers:

"99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 50, 69, 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section ...

...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives."

In the instant case, the Board orders the employer, Transport de l'Est Inc., and its representatives:

- to cease contravening section 94(1) of the Code;
- to post these reasons for decision immediately in all work places to which the employees covered by the applications for certification related to this complaint must report.

The Request to Apply Section 25

Section 25 of the Code reads as follows:

"25.(1) Notwithstanding anything in this Part, where the Board is satisfied that a trade union is so dominated or influenced by an employer that the fitness of the trade union to represent employees of the employer for the purpose of collective bargaining is impaired, the Board shall not certify the trade union as the bargaining agent for any unit comprised of employees of the employer and any collective agreement between the trade union and the employer that applies to any such employees shall be deemed not to be a collective agreement for the purposes of this Part."

In prohibiting the Board from certifying a trade union where it is satisfied that this trade union is so dominated or influenced by the employer that its fitness to represent the employees is impaired, the Code establishes the principle that a trade union is independent of the employer of the employees it represents (CJRC Radio Capitale Ltée, supra; Airwest Airlines Ltd. et al. (1980), 42 di 247; and [1981]

Can LRBR 427 (CLRB no. 288); Cabano Transport Ltd. (1981), 42 di 318 (CLRB no. 294); and Ganeca Transport Inc., supra). It is essential that this be so because the interests of both sides do not always coincide; the union must be able to keep the employer at arm's length so that it can effectively defend the employees' interests. The Board wishes to point out that if this provision is often applied when there is evidence of violation of section 94(1), it has no discretion regarding the application of said provision, as it has in the case of the remedies provided for in section 99. In the wake of any hearing subsequent to the filing of an application for certification, the Board shall not certify a union where the conditions described in section 25(1) obtain, whereas section 99 speaks of an order that the Board may make. Finally, we note that the orders to which section 99 refers can apply only in respect of a party to a complaint.

In the instant case, the Board must ask itself whether the assistance that the employer gave during the organizing campaign now renders the Association incapable of maintaining the degree of independence from the employer that is required by the Code. At issue now is not so much the employer's conduct, as the consequences of this conduct on the ability of the Association to properly represent the employees of Transport de l'Est Inc.

As the Board has pointed out before, in the majority of cases of this kind, direct evidence is rare:

"... Similarly, since a trade union that is dominated or influenced by an employer is liable to be refused certification, unions are unlikely to disclose readily any ties they may have with employers. Only rarely do we find a party admitting to having violated the provisions of the Code or openly engaging in prohibited activities. Nonetheless, experience has shown that there are many signs which enable us to recognize a union that is dominated or influenced by an employer. Frequently, such a union will be an independent one, created when a unionization campaign is being

conducted by another union. In general, this type of union is created in great haste and recruits a majority of the employees of the enterprise very quickly. This can often be explained by the more or less discreet support given the union by the employer or some of his representatives. Union meetings are held at the workplace and during the working hours of the employees, who are not penalized in any way. Recruitment is also done during working hours, often with the knowledge of the employer's representatives, if not their assistance. The emerging union has limited financial resources but can nevertheless afford all the professional or technical assistance it needs. Documents are typed or photocopied at the workplace by persons working in close collaboration with the employer or with his authorization. Management representatives attend or participate in union meetings or openly invite employees to attend. Needless to say, circumstances vary with each case. The fact remains, however, that a union which is dominated or influenced by an employer can seldom be set up without incidents of this nature occurring. Consequently, if there is evidence that such incidents have occurred, this must raise some doubt as to whether the union is genuinely independent of the employer. ..."

(CJRC Radio Capitale Ltée, supra, pages 432-433; 591-592; and 360)

"In this type of case, as in cases of dismissal for union activities, we do not expect to receive direct evidence that the employer has dominated, influenced or initiated the establishment of a union, or that the dismissal is related to an employee's union activity. In such cases, we must base our decision on our assessment of the circumstantial evidence which is submitted to us. It is only in exceptional cases, as we have just mentioned, that direct evidence will be available. ..."

(Cabano Transport, supra, pages 333-334)

In Reimer Express Lines Ltd. et al. (1979), 38 di 213; and [1981] 1 Can LRBR 336 (CLRB no. 226), the Board stressed the importance of analyzing "the whole picture in a labour relations context," and the decision in Graham Cable TV/FM (1986), 67 di 57; 14 CLRBR (NS) 250; and 86 CLLC 16,047 (CLRB no. 588), provides an example of this analysis:

"... All these events had to plant the seed in the mind of employees that the employer would not, to say the least, be adverse to the formation of an association. Is not being adverse to the formation of an association sufficient for the Board to invoke section 134(1)? In the context of the instant case, the Board is of the view that it is. In order for a trade union to function as such,

there must be a proper arm's length relationship between itself and the employer and not only must that arm's length relationship exist, it must be seen to exist in the eyes of its employees. In the instant case, there can be no doubt that the appearance of this arm's length relationship was severely tarnished, if not gone altogether. Without a proper and true arm's length relationship, meaningful collective bargaining cannot take place and no meaningful representation of employees can take place by the Association."

(pages 73; 267; and 14,448)

The expression "arm's length" relationship does not here mean a permanent state of war. All it means, as the Board said in CJRC Radio Capitale Ltée, supra, is the following:

"... If the intent of the Code's provisions governing collective bargaining is to be respected, it is essential that the union representing the employees be well and truly their representative and not a representative of the employer or an organization which is so dominated by the employer that it could not effectively represent the employees in relations with the said employer."

(pages 432; 591; and 360)

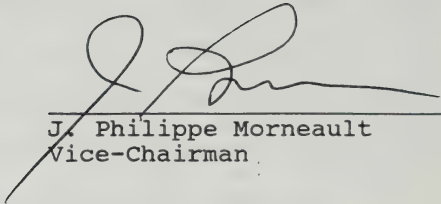
Having analyzed the evidence, the Board concludes that the Association cannot effectively represent the employees of Transport de l'Est Inc. The Association not only did not encounter opposition from the employer, but also sought and received the employer's support, as the following facts reveal. Its principal organizer, Jacques Hamel, was able to discuss the matter of a union with some 40 employees, in a single day, without any hassle from the employer, whereas Michel Raymond, representing the UFCW, managed to speak to only 2 employees, because he felt that he was being too closely watched to speak to more. Jacques Hamel was informed by management of the reasons for the stoppage of work on the refrigeration system, and the fact he said nothing to his fellow workers about this, in the atmosphere described earlier, is understandable in the light of subsequent events. Three important managers of the company attended the April 11 meeting. Immediately following their departure, all

employees present, save one, resigned from the UFCW, and a week later, a majority of the employees joined the Association that was legally formed in the meantime. This direct and indirect collaboration by the employer, when added to the fact that the stated objective of Jacques Hamel, the principal officer of the Association, was to leave the UFCW, irreparably tarnishes the future of the Association. It would be incapable, if certified, of maintaining the arm's length relationship with the employer that is essential in defending the interests of the employees.


For these reasons, the Board concludes that the Association is so dominated or influenced by the employer that its fitness to represent the employees for the purpose of collective bargaining is impaired and it dismisses its application for certification (file 555-3449).

Accordingly, the Board declares null and void the memberships taken out in the Association by the employees of Transport de l'Est Inc., rescinds the representation vote held on September 2 and August 27 in files 555-3439 and 555-3449 and orders that the uncounted ballots that have been kept until now be destroyed. Finally, the Board will issue a certification order on behalf of the UFCW because this trade union met, at the time it filed its application, the certification requirements of the Code.

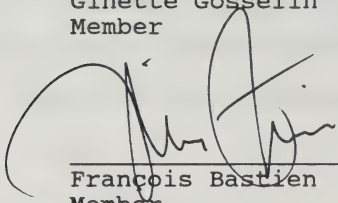
This is a unanimous decision.



J. Philippe Morneault
Vice-Chairman



Ginette Gosselin
Member



Francois Bastien
Member

ISSUED at Ottawa, this 27th day of January 1993.

CCRT/CLRB - 987

Information

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Summary

Jocelyn Simon, Jean-Louis Fontaine and Raymond Gélinas, complainants, and Canada Post Corporation, respondent.

Board File: 950-218

Decision No.: 988

Résumé

Jocelyn Simon, Jean-Louis Fontaine et Raymond Gélinas, plaignants, et Société canadienne des postes, intimée.

Dossier du Conseil: 950-218

Décision n° 988

The complainants alleged that the employer suspended them for exercising their right to refuse to work as provided in Part II of the Code.

The Board reaffirmed that the obligation to make a report to the employer in accordance with section 128(6) of the Code when exercising the right of refusal is met even if the employee does not specifically refer to the provisions of the Code and does not explain in detail the reasons for the refusal.

Two of the complainants have not convinced the Board that they had reasonable cause to refuse to work in accordance with section 128(1) when they decided, after looking outside the window of a taxi, that delivering mail, on December 3, 1991 in a neighbourhood of Grand-Mère, constituted a danger to their health and safety. The Board was convinced rather that the real reason for their refusal was not related to occupational health and safety.

The Board allowed the third complaint. The employee established that he had reasonable cause to refuse to work. The employer had impeded the implementation of the investigation process

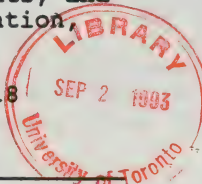
Les plaignants allèguent que l'employeur leur a imposé des suspensions parce qu'ils ont exercé leur droit de refuser de travailler prévu à la Partie II du Code.

Le Conseil a réaffirmé que l'obligation de faire rapport à l'employeur comme l'exige le paragraphe 128(6) du Code lors de l'exercice d'un droit de refus est satisfaite même si l'employé ne fait pas explicitement référence aux dispositions du Code et n'explique pas de façon détaillée les motifs de son refus.

Deux des plaignants n'ont pas convaincu le Conseil qu'ils avaient un motif raisonnable de refuser de travailler au sens du paragraphe 128(1) lorsqu'ils ont décidé, par suite d'une vérification visuelle faite de l'intérieur d'un taxi, que la livraison du courrier, le 3 décembre 1991 dans un secteur de la ville de Grand-Mère, constituait un danger pour leur santé et leur sécurité. Le Conseil est plutôt convaincu que la vraie raison du refus est autre que des raisons liées à la santé et à la sécurité au travail.

Le Conseil a accueilli la troisième plainte. L'employé a établi qu'il avait un motif raisonnable de refuser de travailler. L'employeur a empêché la mise en oeuvre de la

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provided in the Code by suspending forthwith the employee who refused to work.

The Board reiterated its position to accept the presumption established in section 133(6) when the employer hinders the application of the rules of Part II of the Code by refusing or failing to investigate and by disciplining forthwith the employee.

procédure d'enquête prévue au Code en imposant sur-le-champ une suspension à l'employé qui refusait de travailler.

Le Conseil a réitéré sa position d'accepter le jeu de la présomption établi au paragraphe 133(6) lorsque l'employeur empêche l'application des règles de la Partie II du Code en refusant ou en négligeant faire enquête et en imposant immédiatement une mesure disciplinaire.

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LES MOTIFS DE DECISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Jocelyn Simon, Jean-Louis
Fontaine and Raymond Gélinas,

complainants,

and

Canada Post Corporation,

respondent.

Board File: 950-218

The Board was composed of Ms. Louise Doyon, Vice-Chair, sitting as a single-member panel pursuant to section 156 of the Canada Labour Code (Part II - Occupational Safety and Health).

Appearances

Mr. Denis Courteau, accompanied by Mr. Daniel Hardy, for the complainants; and

Mr. Marc Santerre, accompanied by Ms. Johanne Gagnon, assistant, and Mr. Fernand Villeneuve, manager, for the respondent.

These reasons for decision were written by Ms. Louise Doyon, Vice-Chair.

I

The Proceedings

On December 23, 1991, the Board received three complaints of unfair labour practice in which it is alleged that the Canada Post Corporation (CPC or the employer) contravened section 147(a)(iii) of Part II of the Code, which reads as follows:

"147. No employer shall

(a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of

his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee

...

(iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; ..."

The complaints of Jocelyn Simon, Jean-Louis Fontaine and Raymond Gélinas are based on section 133(1) of the Code which reads as follows:

"133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention."

In such a case, the employeur must prove to the Board that it did not discipline employees because they had exercised a right conferred by Part II of the Code.

Section 133(6) provides as follows:

"133.(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party."

The complainants alleged that the employer had unlawfully imposed on them suspensions ranging from one to three days, as the case may be, following their refusal to work on December 3, 1991.

The Board heard the parties at a public hearing on April 13 and September 8 and 9, 1992. It began its deliberations on October 8, 1992, after receiving the parties' final written submissions.

II

The Facts

Messrs. Gélinas and Simon are regular letter carriers who have worked for the employer for 17 years, and Mr. Fontaine has been a relief letter carrier for 7 years. All three work out of the postal facility located on 5th Avenue in Grand-Mère. Messrs. Gélinas and Fontaine are shop stewards and members of the safety and health committee. Mr. Gélinas also sat on the committee on adverse weather conditions.

On December 3, 1991, 15 letter carriers provided mail delivery on 12 routes at the Grand-Mère post office. Yvon Verreault is superintendent of this postal unit, and Fernand Villeneuve is manager of the northwest zone, which includes the Grand-Mère post office. Mr. Villeneuve is based in Trois-Rivières. The hours of work in effect on this date were 7:00 a.m. to 3:30 p.m. with a meal break from noon to 1:00 p.m.

On the morning of December 3, 1991, Messrs. Gélinas and Simon were working their regular routes. Mr. Fontaine was assigned to telephone duty. In the afternoon, he was scheduled to assist Mr. Gélinas in delivering half of his mail. This was the normal arrangement, and on that day, Mr. Fontaine was supposed to help Mr. Gélinas. He was familiar with that carrier's route because he had delivered mail on it on several occasions, in all seasons and in different weather conditions.

The complainants refused to deliver the mail during the afternoon of December 3, 1991 because, they claimed, weather conditions constituted a danger to their safety and health.

The circumstances of this refusal to work can be summarized as follows.

1. Messrs. Gélinas and Simon followed their normal work schedule in the morning and returned to the post office shortly before the meal break. They then went home by car to have lunch. They returned to work shortly before 1:00 p.m., as scheduled. Mr. Fontaine did not leave the post office during either the morning or the meal break.

2. Mr. Gélinas went to Mr. Verreault's office shortly before 1:00 p.m. to ask him if it was true that the joint committee on adverse weather conditions had been abolished. Mr. Verreault confirmed this, adding that Mr. Fontaine had been informed a week earlier. Mr. Gélinas did not appear pleased with this news, and he said so at the hearing. He asked Mr. Verreault what the arrangements were for the afternoon of December 3. Mr. Verreault told him that he had checked conditions at noon and that there was no reason to alter the mail delivery procedures. Shortly thereafter, while Mr. Verreault was preparing to leave the post office to go and open Mr. Simon's relay box which, according to Mr. Simon's testimony, was frozen, he overheard Mr. Gélinas and certain letter carriers discussing the abolition of the committee.

3. Messrs. Gélinas and Fontaine left the post office around 1:00 p.m., accompanied by another letter carrier, G. Marchand. They took a taxi together to get to the place where they were to begin delivering the mail. The taxi dropped off Mr. Marchand first. It then drove Messrs. Gélinas and Fontaine to the place where Mr. Gélinas was to begin his afternoon walk. At that point they decided, without getting out of the taxi, that the weather conditions constituted a danger to their safety and health. Having so decided, they did not go to the place where

Mr. Fontaine was to begin his work, a few streets farther on. They decided not to deliver the mail and to return to the post office in the taxi. They reached the post office shortly after 1:30 p.m.

4. Mr. Verreault had left the post office around 1:00 p.m., and when he returned, he saw that Messrs. Gélinas and Fontaine had returned without completing their route. He suspended the complainants, after they twice refused to comply with his request to complete delivery of the mail. They explained to Mr. Verreault that weather conditions made the work too dangerous. Mr. Gélinas did not tell him at the time, or at any point, of the problems he had encountered that morning and that he related at the hearing.

Mr. Verreault advised them to punch their timecards, leave work and wait until he called them. The complainants interpreted this action as a dismissal. On the recommendation of the labour relations department at CPC, which he contacted following the incident, Mr. Verreault called the complainants at mid-afternoon and told them to report for work the following morning.

5. Mr. Fontaine stated at the hearing that once before, in 1990-91, he had refused to work because of a danger, but could not provide details of the time or circumstances of this refusal. According to the employer, this was the first time that letter carriers at the Grand-Mère post office had refused to work because of a danger, specifically because of bad weather.

6. Around 1:00 p.m., Mr. Simon took a taxi with another letter carrier, from the post office, to get to the place where he was to begin his afternoon walk. The taxi dropped him off first. He took the mail from the relay box and began delivering it. Some 10 minutes later, after making 20

or 25 deliveries, he reached the main street of Saint-Georges, in Grand-Mère. He then decided that it was too difficult to continue working without endangering his life and safety. He explained that the sidewalks in this area were not ploughed in winter, and since the street had not been cleared, Mr. Simon had to walk more or less down the middle of the street, walking backwards, because of the snow, the wind and the sleet that had begun falling early that afternoon. Traffic was heavy on this commercial artery, and since the surface of the road was icy beneath the snow, motor vehicles could easily hit him at any time. He stopped at a convenience store and telephoned home to ask that someone pick him up and drive him back to the post office.

On his return to the post office at around 2:10 p.m., he went to his work station to file the undelivered mail, in accordance with procedure. Mr. Verreault asked him what he was doing there. Mr. Simon replied that the bad weather prevented him from delivering the mail and that he was therefore filing his mail. Mr. Verreault ordered him to return to work. Mr. Simon refused. Mr. Verreault summoned him to his office. Serge Trépanier, sales representative at the Grand-Mère post office, was already in the office. Mr. Verreault again ordered Mr. Simon to return to work, and Mr. Simon again refused. Following the instructions received from the labour relations department after the Gélinas-Fontaine incident, Mr. Verreault then gave him a notice of a disciplinary interview scheduled for December 5, 1991 and ordered him to go home immediately.

Mr. Simon claimed that he told Mr. Verreault that he had fallen twice that morning and had no intention of being killed while delivering mail. He had not informed Mr. Verreault at noon of that morning's falls and had not deemed it necessary to write a report concerning this matter

because he had not sustained any injuries. He told the Board that he suffered from curvature of the spine and that he normally used a cart to transport the mail. He did not do so on December 3 because of the snow.

7. When they arrived home, the complainants left messages on the answering machine at the union local, and union representative Donald Parent returned their calls late that afternoon. After obtaining the complainants' versions, he contacted a Labour Canada safety officer at around 4:30 p.m. The officer told him that Labour Canada should have been informed of the situation when the incidents occurred, early that afternoon, and that it was too late to conduct an investigation.

8. Mr. Parent is a letter carrier in Trois-Rivières. On December 3, he worked as usual, although he had a few problems because of strong winds and sleet. According to him, working conditions that day were not ideal. Mr. Parent delivered the mail using the so-called "straight-through delivery" method, i.e., he did not take a meal break. This was a common practice in Trois-Rivières and Mr. Parent followed it regularly. He completed his workday around 2:00 p.m. In the next few days, he asked the union stewards at the other offices in the region about the situation that existed on December 3. Nothing unusual was reported, except in Shawinigan where one employee, who had previously suffered an injury on duty, returned to the post office early.

9. Until the fall of 1991, all post offices in the northwest zone had set up committees on adverse weather conditions. These joint committees had been established in 1985 following an agreement between the Letter Carriers' Union of Canada and CPC. Their task was to rule on mail delivery procedures when special weather conditions required

it. For example, they could decide whether mail delivery would be continuous or restricted to certain areas, shopping centres or apartment buildings. The objective was to protect the health and safety of employees, while providing quality postal service in poor weather conditions. Under the agreement, preference was given to maintaining partial or limited delivery service as opposed to no service at all.

10. In November 1991, the employer abolished these committees without first consulting or informing the union. According to the employer, the difficulties in applying this mechanism, in particular the lack of uniformity in the decisions and the difficulties in making decisions in the absence of the responsible union officers, led to their abolition. On November 26, Mr. Parent received a letter dated November 22 informing him of this decision. He informed the local stewards that they would be officially notified by the employer of this action in the coming days. Mr. Verreault informed Mr. Fontaine of this situation on November 26 or 27. With the abolition of these committees, the postal unit superintendent became the sole person responsible for determining mail delivery procedures in special weather conditions.

11. For the complainants, abolition of the committee on adverse weather conditions meant that the decision to refuse to work because of a danger would in future be an individual one, because the mechanism governing these matters had been abolished. Mr. G  linas explained that this was the feeling that emerged from the conversations he had with his fellow workers after leaving Mr. Verreault's office on December 3 at 1:00 p.m.

12. Mr. Verreault did not know, prior to December 3, the procedure to follow when employees refused to work because there was a danger to their safety and health. Neither

Mr. Villeneuve nor the labour relations department explained to him on December 3, 1991 the procedure set out in Part II of the Code.

13. Apart from the complainants, no letter carriers at the Grand-Mère post office brought back any more undelivered mail on December 3 than they did any other day, and none requested overtime to complete his workday. Not one of the ten post offices in the northwest zone informed Mr. Villeneuve of any special problems that occurred on December 3. Of a total of 160 mail routes in this sector, only the 2 routes assigned to the complainants were not completed.

14. The evidence concerning the weather conditions at different times of the day on December 3 is contradictory.

According to the employer, this was the first snowfall of the season, and although the wind caused a buildup of snow in certain places during the morning, the snow and wind had diminished considerably by early afternoon. Shortly before 1:00 p.m., Mr. Verreault inspected part of the mail routes assigned to the three complainants. He noted that it was snowing and the wind was blowing, but the visibility was acceptable and the roads were not slippery. When he went out again around 1:00 p.m., he noted the same conditions.

Mr. Verreault did not deem it necessary to take special measures to ensure mail delivery in the afternoon, since the weather conditions did not require it. Moreover, no letter carrier had complained of the conditions that existed that morning, and the precipitation had decreased. Even though conditions were not ideal, the situation was not exceptional. This type of situation occurred 10 to 12 times each winter and was part of the letter carriers' normal working conditions. The employer felt that the complainants

refused not because they had reasonable cause to believe that a danger existed, but rather because they were frustrated following the abolition of the committee on adverse weather conditions.

According to the complainants, the situation that existed on the afternoon of December 3 constituted reasonable cause to believe that a danger existed and warranted a refusal to work. The snow, the wind, the reduced visibility caused by blowing snow and the icy roads and sidewalks beneath the snow that had fallen since the morning constituted conditions that were so adverse that delivering mail at the time endangered the lives and safety of the letter carriers.

III

The Decision

The Board must decide whether the employer disciplined the complainants for having refusing to work because they believed there was a danger to their safety and health. Section 128(1) of the Code confers the right to refuse to work on employees in these terms:

"128.(1) Subject to this section, where an employee while at work has reasonable cause to believe that

(a) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or

(b) a condition exists in any place that constitutes a danger to the employee,

the employee may refuse to use or operate the machine or thing or to work in that place."

This provision provides that the refusal to work must be for reasonable cause. The Board must decide, when examining complaints under section 147(a), whether there was reasonable cause and, if so, whether the employer

disciplined an employee for having exercised this right. (See Bermiline Jolly (1992), 16 CLRBR (2d) 300 (CLRBR no. 929).)

First, the employer argued that the complainants' refusal was not expressed explicitly and clearly enough to enable it to understand that this refusal was based on an alleged danger. The Board has stated before that there is no magic word or standard formula, or obligation to refer explicitly to the provisions of the Code, in order to convey sufficiently and properly a refusal to work.

The manner in which the complainants expressed their refusal in the present case is comparable with that which the Board endorsed in Harry Finley (1992), as yet unreported CLRBR decision no. 948; and Don Koski (1992), as yet unreported CLRBR decision no. 950. Although the complainants did not explain in detail the reasons for their refusal and did not refer explicitly to the Code, the Board is satisfied that they made the report to the employer required by section 128(6).

That Mr. Verreault did not understand the meaning and scope of the reasons given by the complainants does not deny them the protection of the Code. Since Mr. Verreault was unaware of the procedure to follow in case of a refusal to work because of a danger, it is understandable that he did not grasp what was happening. The consequences of this lack of understanding cannot, however, be held against the complainants. As the Board stated in Rodney Noel (1986), 64 di 17 (CLRBR no. 552):

"... The possibility that it was misunderstood by the supervisor and the general foreman does not invalidate it nor does that give the employer any licence to fail to discharge his responsibilities under the law."

Mr. Verreault immediately disciplined the complainants, thereby preventing them from proceeding to the other steps of the procedure, i.e., making a report to a member of the safety and health committee, particularly in Mr. Simon's case, and eventually to a Labour Canada safety officer to enable the latter to investigate and render a decision on the existence of a danger. In these circumstances, the employer cannot now claim that the complainants did not meet the requirements for exercising the right of refusal, having itself prevented them from doing so through its actions. Consequently, the Board finds that the complainants' refusal meets the requirements of the Code.

The Board must now determine whether the employer disciplined the complainants because they had exercised the right of refusal conferred by Part II of the Code. To this end, the Board must decide whether the complainants refused to deliver the mail on the afternoon of December 3 because they had reasonable cause to believe that there was a danger to their safety and health.

The concept of reasonable cause is not defined in the Code. It is one criterion for assessing the conduct, behaviour and attitudes of an employee when he refuses to work. It is a standard that must be applied and interpreted on a case-by-case basis. In Alan Miller (1980), 39 di 93; [1980] 2 Can LRBR 344; and 80 CLLC 16,048 (CLRB no. 243), the Board defined certain parameters for assessing the existence of a reasonable cause:

"In answering the question of whether or not such reasonable cause existed the Board will have regard to all the circumstances surrounding the employee's action with a view to assessing, not primarily the degree of danger present, but the reasonableness of the belief of its existence held by the employee. It is the Board's opinion that to afford its protection the Code does not require the employee to be correct in his

apprehension of imminent danger and consequently a finding by a safety officer acting pursuant to subsections 81.1(7) and 81.1(8) contrary to the employee's opinion does not, by itself, amount to a finding as to the reasonableness of that belief. However, while a conclusion that no imminent danger existed cannot serve as a complete defense to a charge against an employer under paragraph 97(1)(d) of the Code, evidence adduced to support such a finding might serve to cast doubt upon the reasonableness of the employee's belief.

The necessary determination of whether reasonable cause for belief in the presence of imminent danger [existed] will to a large extent depend upon an assessment by the Board of the various influences coming to bear upon the employee's decision to refuse to work. Some of the factors which should be examined in terms of their influence upon the employee's belief include his motivation, i.e., whether or not bona fides, the extent of his experience and familiarity with the job and work place in question, and the quality of his knowledge of the circumstances leading to his apprehension of danger. Arguably another is the effect anxiety over safety concerns may have had upon his judgment at the time of his refusal to work. However, in order for this element to have a favourable bearing upon a determination of reasonableness of belief the state of mind must have been directly and understandably brought about by reasonably held safety related concerns already existing at the work place."

(pages 102-103; 351-352; and 753; emphasis added)

(See also Paul Laprise (1990), 80 di 137; and 13 CLRBR (2d) 151 (CLRB no. 793).)

Since that decision was rendered, the concept of danger has been amended by the removal of the adjective "imminent." This change, however, does not affect the relevance of the criteria established by the Board for determining whether there is reasonable cause.

As the Board pointed out in that case, it does not have to be satisfied that a danger existed when the refusal occurred in order for an employee to enjoy the protection of section 147(a). Employees may be mistaken in their assessment of a danger, but they must satisfy the Board that they genuinely believed that a danger existed so that the Board is in turn satisfied that they had reasonable cause to act as they did.

The reasons given by Messrs. Gélinas and Fontaine for their refusal do not constitute reasonable cause. The Board considers it unacceptable for letter carriers with extensive work experience to decide, inside a taxi, merely by looking outside, that delivering mail would pose a danger to their safety and health, and therefore constituting reasonable cause to refuse to work.

The complainants have not satisfied the Board that the reason alleged was the real and reasonable cause of the refusal. Rather, the Board is convinced that the reason for the refusal is the dissatisfaction and frustration resulting from the abolition of the committee on adverse weather conditions. The Board is prepared to concede that the employer's decision to terminate a negotiated agreement unilaterally, without informing the union and discussing alternatives with it, would give rise to discontent and frustration.

This situation, however, does not warrant the employees' responding by invoking Part II.

In its earlier decisions concerning the right to refuse to work, the Board established that this right must not be used as a roundabout way of or pretext for settling other labour relations problems. In this context, it said it would scrutinize the reasons for and circumstances of a refusal to work where there exist, at the same time, other employer-employee relations problems. In William Gallivan (1981), 45 di 180; and [1982] 1 Can LRBR 241 (CLRB no. 332), the Board expressed the following opinion:

"An employee's right to refuse under section 82.1 [now 128.1] must be used wisely and only in the true interests of safety. To abuse that right by coupling it to other interests such as to gain an advantage in collective bargaining will, in the long term, defeat the purpose and attainment of the goals of Part IV [now Part II] of the Code.

Improved safety and reduction of health hazards in the work place through consultation and co-operation cannot be accomplished in an air of mistrust and adversity. Any employee refusal which coincides with other labour relations conflicts will receive very close scrutiny from the Board."

(pages 189; and 248)

(See to the same effect Stan Butler (1991), 86 di 107 (CLRB no. 899).)

However, the existence of tensions or disagreements between employer and employees on specific issues does not preclude an employee's refusing to work and enjoying the protection of the Code if that employee personally and sincerely believes that he/she has reasonable cause to believe that a danger exists. This is a question that must be examined case by case.

In the case of Messrs. Gélinas and Fontaine, the Board finds that they did not exercise the right of refusal recognized by Part II. Their complaints are therefore dismissed.

Mr. Simon's case is different. The Board finds that he showed that he had reasonable cause to believe that a danger existed when he refused to continue delivering the mail on the afternoon of December 3, in the circumstances that he related to the Board.

The evidence concerning the weather conditions that existed on the afternoon of December 3 in Grand-Mère is contradictory. The only evidence the Board has on the matter is the testimony of Messrs. Verreault and Simon. This would not have been the case had a Labour Canada safety officer been summoned at the appropriate time to conduct an investigation. The safety officer's decision on whether there is a danger is not evidence for the purpose of determining the validity of section 147(a) complaints.

However, the facts revealed by an investigation can, depending on the circumstances, serve to assess the quality and preponderance of the evidence. This was one of the criteria for assessing reasonable cause adopted in Alan Miller, supra. In this case, this additional information does not exist because the employer, when informed of the refusal to work, immediately disciplined Mr. Simon. It thus prevented the implementation of the procedure set out in the Code, including the intervention of a safety officer. The Board has decided to accept Mr. Simon's version of the facts and finds that he had reasonable cause to refuse to work.

In John Charters et al. (1989), 76 di 188; and 3 CLRBR (2d) 253 (CLRB no. 727), in which CPC was also involved, the Board, after concluding that the complainants' refusal to work was legitimate and not unreasonable in the circumstances, said the following in allowing the complaints:

"CPC did not fulfill its obligation as an employer under section 128(7). It did not carry out an investigation into the circumstances surrounding the refusals with a view to eliminating or reducing any existing danger. What it did was to short-circuit the whole system by immediately disciplining the refusing employees. This is exactly the type of mischief that section 147 of the Code is designed to prevent. When an employer acts like CPC has here, the Board can only presume that the disciplinary measures were taken because the employees had acted in accordance with the Code. ..."

(pages 199; and 263)

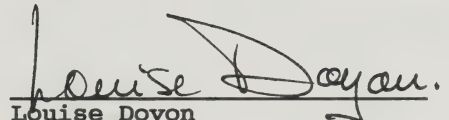
Consequently, where the Board is satisfied that the employee had reasonable cause to believe that a danger existed and where it is established that the employer prevented the application of the rules of Part II of the Code, by refusing or neglecting to conduct an investigation and immediately taking disciplinary action, the Board will apply the presumption established in section 133(6). (See to the same

effect VIA Rail Canada Inc. (1989), 78 di .211 (CLRB no. 761); and Michel Murray (1991), 84 di 134; and 15 CLRBR (2d) 116 (CLRB no. 855).)

This is what it does in Mr. Simon's case and it finds that the suspension imposed on him contravenes section 147(a).

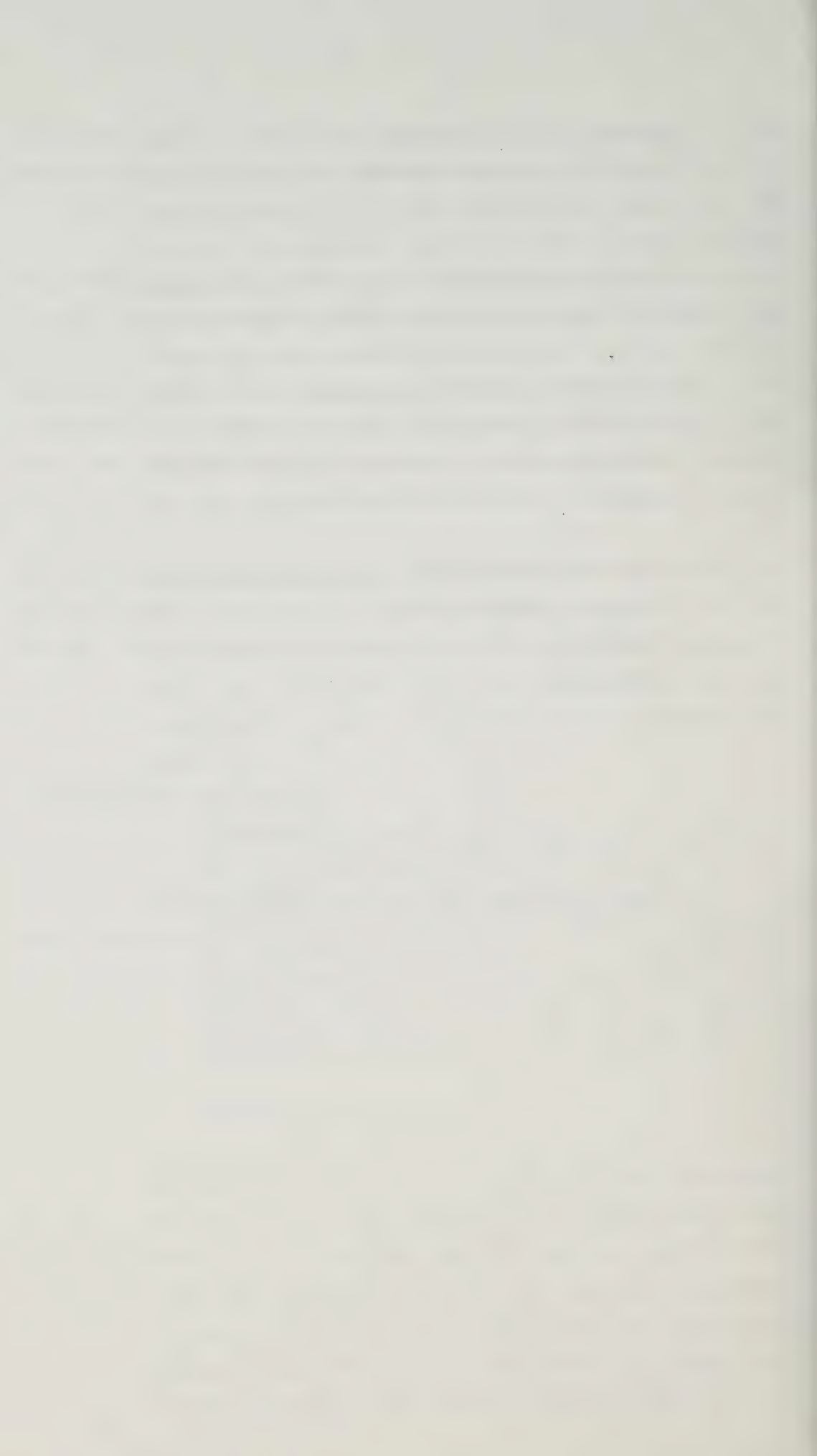
Mr. Simon's complaint is allowed. The Board orders the employer to rescind the three-day suspension it imposed on Mr. Simon and to compensate him for the pay and other benefits he lost, as the case may be.

The Board designates Ms. Suzanne Pichette, director of its Montréal regional office, or any other person she may appoint, to assist the parties in implementing the present decision.


Louise Doyon
Vice-Chair

ISSUED at Ottawa, this 29th day of January 1993.

CCRT/CLRB - 988



information

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Summary

Gilles Charlebois, complainant, Amalgamated Transit Union, Local 279, respondent, and Ottawa-Carleton Regional Transit Commission, employer.

Board File: 745-4164

Decision No.: 989

The Board concluded that the general membership of Local 279 of the Amalgamated Transit Union had not violated section 37 of the Canada Labour Code (Part I - Industrial Relations) - the duty of fair representation provision - when it decided by secret ballot not to take to arbitration two grievances filed by an employee, one of which was against his dismissal as bus driver by the Ottawa-Carleton Regional Transit Commission.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Résumé

Gilles Charlebois, plaignant, Syndicat uni du transport, section locale 279, intimé, et Commission de transport régionale d'Ottawa-Carleton, employeur.

Dossier du Conseil: 745-4164

Décision n° 989

Le Conseil a jugé que les membres réunis à la réunion générale de la section locale 279 du Syndicat uni du transport n'avaient pas violé l'article 37 du Code canadien du travail (Partie I - Relations du travail) - la disposition concernant le devoir de représentation juste - lorsqu'il avait été décidé par un vote secret de ne pas renvoyer à l'arbitrage deux griefs déposés par un employé. L'un des griefs portait sur le congédiement de ce dernier de son poste de chauffeur autobus par la Commission de transport régionale d'Ottawa-Carleton.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Gilles Charlebois,
complainant,
Amalgamated Transit Union,
Local 279,
respondent,

and

Ottawa-Carleton Regional
Transit Commission,

employer.

Board File: 745-4164

The Board was composed of Vice-Chairman Thomas M. Eberlee and Members Robert Cadieux and Mary Rozenberg.

Appearances

Mr. Richard W. Egan, for Gilles Charlebois;
Mr. David J. Jewitt, for Amalgamated Transit Union, Local 279; and
Mr. Roger Mills, for Ottawa-Carleton Regional Transit Commission.

These reasons for decision were written by Vice-Chairman Eberlee.

I

The Board had before it a complaint by Gilles Charlebois that the Amalgamated Transit Union, Local 279 (ATU) had failed to fairly represent him, and had thus violated section 37 of the Canada Labour Code (Part I - Industrial Relations), in its handling of certain grievances and particularly in its decision not to arbitrate his dismissal

by Ottawa-Carleton Regional Transit Commission (OC Transpo). The complaint was filed on February 10, 1992.

Section 37 of the Code reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The Board heard the complaint in Ottawa on September 30, October 1 and October 23, 1992.

II

Gilles Charlebois, a bus driver, had been employed almost 11 years by OC Transpo until he was dismissed on June 12, 1991. He testified that he had become involved in 1981 in the first of a series of campaigns by the Independent Canadian Transit Union (ICTU) to organize the employees of OC Transpo and to replace the ATU as their bargaining agent. He was still involved in 1990 when the latest "raid" by ICTU against the ATU took place. He was known to be a supporter of ICTU and had on more than one occasion engaged in arguments with the leaders of the ATU at union meetings and elsewhere.

Mr. Charlebois told the Board that during his tenure as a bus driver he had filed 15 or so grievances against various things done or not done by the employer. Hence, he was no stranger to the grievance process; on the other hand, despite his known propensity for the ATU's opponent, his

grievances were apparently handled for him, insofar as the ATU became involved in them, without any cause for complaint on his part.

In December 1990, conflict developed between Mr. Charlebois and his supervisor which resulted in his being summoned to a disciplinary meeting with management on December 11 or 12. He was accompanied to that meeting by Paul Jolicoeur, the ATU local's assistant business agent. The result of the meeting was that he was dismissed for "gross insubordination."

A grievance was filed and, with the support of Mr. Jolicoeur and the union, he attended a Step 1 grievance meeting with management on December 21, 1990. There was a strong disagreement between union and management representatives; Messrs. Jolicoeur and Charlebois walked out. Tempers subsequently cooled and the process at Step 1 was reconvened on January 8, 1991.

After what appears to have been a full exploration of all the issues, management relented significantly and offered to take Mr. Charlebois back, but on the basis that he would not be paid for the period he had not worked between the dismissal and January 8. Mr. Charlebois told the Board that Mr. Jolicoeur and another union representative suggested to him that he should accept this proposed settlement. However, he was adamant that he wanted and was entitled to his lost wages and other benefits. OC Transpo management then modified their position and suggested that he go back to his job and file a new grievance in which he would claim the lost wages and benefits.

The union representatives told him that this was a reasonable deal and that he should accept it. He did. Then he mentioned that he was under great personal stress, was under the care of a doctor and was taking medication. Hence, he told the assembled union and management representatives (and he told the Board at the hearing) that he would not be able to return to his job immediately, that he would need to take a week off.

According to Mr. Charlebois, the chief management spokesperson present was "enraged" at this (not altogether surprisingly, it seems to the Board) and Mr. Jolicoeur, too, displayed signs of being displeased. The management representative told him that she was suspending him without pay pending receipt of a doctor's certificate attesting that he was in fact fit to return to work on OC Transpo buses.

At this point, according to Mr. Charlebois, Randy Graham, the ATU local president, was contacted. He immediately came to the meeting, and matters were again cooled out and set more or less back on track. Mr. Charlebois was unable to see his doctor to obtain a certificate until January 24 and, although there was confusion about who would actually prepare a grievance claiming lost wages and benefits up to January 8, 1991, a grievance was filed on January 29.

Mr. Charlebois worked from January 28, 1991 until February 7, 1991 and then he became ill and went off work. He saw his doctor on February 14 and obtained a medical certificate for the period up to February 25.

On February 20, there was a meeting on the question of his

claim for lost wages and benefits but there was no settlement. Meanwhile, OC Transpo sought to have him attend a disciplinary meeting to discuss his general performance. He did not attend any such meeting during March or April 1991 on the ground that he was still unwell. In correspondence filed with the Board, OC Transpo questioned his inability to meet with management at a session scheduled for March 1, when he had apparently been well enough to sit through two full days of hearings at the Board on February 27 and 28.

Mr. Charlebois testified that he was absent on sick leave for 16 weeks. His absence was covered by doctor's certificates. Throughout this period, he was undergoing therapy. Finally, his doctor suggested he return to work on June 3. He decided, however, to take a week of holidays and he returned on June 10.

Expecting to start a training and assessment program on June 10, Mr. Charlebois was instead summoned by management to what turned out to be a disciplinary meeting. He was accompanied by Mr. Jolicoeur. According to Mr. Charlebois he was accused, among other things, of absenteeism. At a second meeting with OC Transpo management on June 12, he was fired again. The employer's letter attributed the dismissal to "your failure to meet the conditions of your re-instatement and to maintain an adequate level of performance. Specific recent issues include absenteeism, insubordination and unco-operative behaviour. These were culminating incidents in a history of poor performance."

And once again a grievance was filed on his behalf. It was dealt with at Step I on June 24 and at Step II on July 4.

The union gave him what appears to the Board to have been the requisite support; management refused to reconsider the termination.

On September 18, 1991, the claim for lost wages and benefits was discussed by union and management representatives, with the participation of Mr. Charlebois, at a meeting at Step III of the grievance procedure. The result was that management modified its stance to the extent of agreeing that the period of suspension without pay, relating to the first episode in December 1990, should only be from December 12 to December 21 and that Mr. Charlebois should be in receipt of sick benefit compensation for the time from December 21 until his short-lived return to work on January 28, 1991.

A Step III grievance meeting on the June 12 dismissal took place on October 1, 1991, again with Mr. Charlebois and management and union representatives present. OC Transpo refused to back away from the decision to dismiss Mr. Charlebois. Up to this point, there is no evidence of any kind that the union's handling of Mr. Charlebois' grievances or its representation of him in any way breached section 37 of the Code. To the Board, the union's behaviour seems quite reasonable in every respect.

Mr. Charlebois told the Board that on October 24 he met with local president Graham and Mr. Jolicoeur. He was dissatisfied with what the company had proposed in respect of his claim for lost wages and benefits in December 1990 and, of course, he wished to pursue his dismissal grievance. He testified that Mr. Graham told him he would not likely win the matter at arbitration because he had

been off work so much. Mr. Jolicoeur told him he didn't think he had a chance at arbitration and that he had been the cause of his own trouble. Such comments, while not welcome to Mr. Charlebois, and understandably so, cannot, however, be taken as indicating that the union's attitude toward him was in any way improper. In any event, Mr. Graham said to him that his grievances would probably be brought before the union's general meeting in November and meanwhile they would be referred to the union's counsel for study and for a recommendation as to the feasibility of their proceeding to arbitration. This was done. In fact, Mr. Charlebois was aware that Mr. Graham had met with the union's counsel on October 31, at which time the Charlebois file was reviewed. And on November 7, Mr. Charlebois himself had a 25-minute talk with the union's counsel.

It is the practice of ATU Local 279 to have a monthly general membership meeting on a Thursday night (it seems to be the second Thursday of the month) for all drivers and other employees on the day shift and to repeat the meeting the following (Friday) morning for drivers and other employees on the evening shift. It is also the practice for the general membership to be called upon to vote on the question of whether grievances will be sent on to arbitration. Grievances are only referred to arbitration by the executive board during summer months when no general membership meetings are held or on other occasions when a quorum does not appear for a month's general membership meetings and the meetings cannot officially take place. Until the summer of 1991, standing votes were held on the question of going to arbitration; by the fall of 1991, the union had changed its rules so that such votes were by secret ballot.

Mr. Charlebois' grievances came up for consideration by the general membership on November 12. In his evidence in chief, he sought to convince the Board that the union had caught him by surprise and that he had not been aware these matters would come to the November 12 meeting. His hope presumably was that the Board would see the union as engaging in arbitrary behaviour (and thus be on the way to breaching section 37) by allegedly not giving him proper notice. In the light, however, of his testimony a few minutes earlier that Mr. Graham had told him on October 24 that he would try to bring the matters to the November 12 meeting, the Board doubts that Mr. Charlebois suffered any real surprise and was in any way disadvantaged by the grievances not being delayed but being brought forward on the November agenda.

Mr. Charlebois told the Board that he noticed a larger than usual attendance at the meeting. Most of those present were unknown to him. He was surprised at the size of the turnout. Somebody told him that the reason so many were in attendance was because of the vote on his grievances.

Evidence adduced during the hearing suggests to the Board that the attendance at the meeting was not in fact unusually large. In any event, at the time, Mr. Charlebois raised no objection, even if, as he suggested at the hearing, he found it surprising. The Board cannot conclude that the meeting was "packed" against him; there is simply no hard evidence to that effect. He also made no claim at the meeting that he had had insufficient notice and was not ready to have his grievances considered.

Up to the point at least when the meeting began, the union

had in no way violated section 37 in its representation of Mr. Charlebois. If the complaint has any validity, it must therefore be due to circumstances arising in the course of and out of the November 12 meeting and its continuation the next morning, and in the decision made by the membership not to refer the grievances to arbitration.

Mr. Charlebois testified that Mr. Jolicoeur, the assistant business agent who had represented him throughout the processing of the grievances was not present on November 12 and 13. According to Mr. Charlebois, it was important that Mr. Jolicoeur be there because he knew all about Mr. Charlebois' "ordeal." There is no evidence that Mr. Charlebois personally asked the meeting to delay considering the grievances until another day when Mr. Jolicoeur might be available. (Mr. Jolicoeur was absent because of illness.) Mr. Charlebois claimed that some unnamed member suggested a postponement, but Mr. Charlebois himself was silent at the meeting on the matter. In any event, Mr. Graham told the meeting - according to Mr. Charlebois - that he was fully familiar with the grievances and would be able to proceed in the absence of Mr. Jolicoeur. And the Board has no reason to doubt that Mr. Graham was fully familiar with them.

The Board is unable to find, as Mr. Charlebois' counsel would have it do, that proceeding with the consideration of the grievances in the absence of Mr. Jolicoeur was an element of failure by the union to observe its duty of fair representation.

As is customary in such matters, the legal opinion of the union's counsel was read in full by the secretary to the

meeting. Mr. Graham prefaced it by stating that it had only just been received from counsel and that there had been no time for the executive board to consider it. Hence there would be no recommendation from the executive board. Mr. Charlebois saw the absence of a comment by the executive board as being another element of unfair representation. The Board is unable to agree with him.

Mr. Charlebois testified that some in attendance could be heard grumbling about the lengthy opinion and about the fact that it took the secretary several minutes to read it. He told the Board that several people were obviously unsympathetic to him. Neither reaction seems to the Board to be at all unusual; nor indeed, if somebody actually did react that way, was such a reaction in itself symptomatic of behaviour that was contrary to section 37.

In the written opinion which was read to the two meetings, the union's counsel described and analyzed the situation at considerable length and concluded that there was a good chance the dismissal would be overturned at arbitration.

Mr. Charlebois was given every opportunity to state his case; he testified that he answered questions from union members for about 45 minutes. Much the same procedure occurred at the Friday morning meeting. There was no evidence that he was impeded in any way in making his case to the membership.

Mr. Charlebois recalled Mr. Graham mentioning that he (Charlebois) did have the rather unusual record of using more than 400 days for sick leave in 10 years of employment with OC Transpo. According to Mr. Charlebois, the local

president said nothing good about him. Mr. Charlebois also thought he heard somebody else say, not on the microphone, that he should take his problem to the head of ICTU (the ATU's rival) in Vancouver. Another person-allegedly said, also not on microphone, that an arbitration costs \$30,000 and Mr. Charlebois wasn't worth it. "It felt like the whole crowd wanted to go against me," Mr. Charlebois testified. Michael Wood, another OC Transpo driver, a strong supporter of the rival ICTU, told the Board that the meeting was very disorderly and there were several persons who shouted unfavourable comments about Mr. Charlebois. Other witnesses disputed these claims. The evidence does not suggest that there was anything approaching a mob scene against Mr. Charlebois.

Members voted by secret ballot for or against sending the grievances to arbitration. The ballots cast at the evening meeting on November 12 remained uncounted and locked in the ballot box; the ballots cast at the morning meeting on November 13 were added to the box and were counted at the conclusion of the morning vote. The results were announced at the morning meeting on November 13.

Thirty-six members voted to send the grievances to arbitration. Sixty-three voted against. There were three spoiled ballots.

During the course of the hearing, Mr. Charlebois was critical of the way the vote was taken; he claimed there were no "safeguards" to ensure that it was not tampered with - to his disadvantage. On the other hand, during the actual voting process, he made no protests of any kind either against the voting system being used or against the

way it was being operated.

There is no evidence that the leadership of the union displayed any bias against him or encouraged the membership to vote against sending his grievances to arbitration or that they ran the meeting and conducted the vote in anything but a neutral way. There is no evidence of any stacking of the meeting or of any anti-Charlebois manipulations. Mr. Charlebois stated in testimony that he was refused the right to witness the count of the ballots. The Board doubts this assertion; it accepts the evidence of others that he could have had a scrutineer do so on his behalf, but he did not ask. Nor did he subsequently ask for a recount, as the local's rules allow him to do.

The Board is satisfied, on the basis of all of the evidence adduced at the hearing, that nothing occurred either in the way the meeting was conducted or in the taking and processing of the vote that could contribute to any conclusion that section 37 was breached.

If there was a violation of section 37, it must be found, in the outcome of the vote itself and in the minds of those decision-makers - the 63 union members - who voted against Mr. Charlebois.

Local 279 of the Amalgamated Transit Union is somewhat unique in the world of unions in that it reserves to the general membership the authority to decide whether a grievance will go to arbitration. Moreover, since that decision is made by secret ballot, it is thus impossible to identify the individuals and how they voted. There is absolutely no way of knowing whether any or all individuals

in this case, who voted against Mr. Charlebois' grievances going to arbitration, harboured feelings, or were actuated by sentiments against him that, were the Board aware of them, could be considered to render the union's conduct arbitrary, discriminatory, or in bad faith or involving any other factor that might conflict with the Code.

Most unions give the authority to an individual or a group of individuals in a grievance committee or on an executive board to make a decision about taking a grievance to arbitration. The decision-makers can be identified and their rationale for dropping a grievance can more readily be explored and identified, both by a complainant in respect of deciding to make a complaint and bringing evidence before the Board and by the Board in determining whether the complaint has validity.

Here, it is impossible for a complainant or the Board to have anything more than the most impressionistic understanding of what may have motivated people to vote in the way they did. In this case, Mr. Charlebois is really trying to have the Board conclude that largely because the union membership voted against him, in the face of an opinion by legal counsel that his dismissal grievance would have a good chance at arbitration, then ergo there is a violation of section 37 and the Board must overturn the union's decision. He has surrounded this contention with a few "facts" which he hopes will convince the Board that on a balance of probabilities the union's decision in this case was a failure to represent him fairly.

It has been suggested that a decision-making system such as that adopted and employed by Local 279 is in itself wrong

and almost automatically and inevitably leads to miscarriages of justice in respect of the handling of grievances. Moreover, it has been argued that when the Board faces a situation where the union is unable to explain, in the final analysis, as is the case here, why a particular decision was taken, then that decision must be presumed to be in violation of section 37. Both notions rest on very unsound premises.

It is the right of a union up to a point to choose its own decision-making machinery. That point would, of course, be irrationally exceeded if it chose to flip coins or to examine the entrails of rabbits in order to reach conclusions about whether grievances should go to arbitration; this and any board would find that that kind of system was arbitrary by definition.

In a previous decision involving the same union, M.A. Ladds (1991), 85 di 160; and 91 CLLC 16,054 (CLRB no. 879), the situation was similar. Among other things, the Board said:

"The ATU 'system' is to let the general membership decide whether a matter should go to arbitration. When, as is the case with many other unions, such a matter is decided by an individual or by a committee, it is somewhat easier to obtain an understanding of why a particular course of action was adopted and followed. Thus can the Board attempt to come to an assessment of the motivation and the behaviour involved in terms of whether the union seems to have acted arbitrarily, discriminatorily or in bad faith.

Direct democracy is considerably more opaque. It is impossible to obtain a picture of what was in the minds of each of the 80 people who voted not to send Mr. Ladds' grievance to arbitration and to understand readily why they took that course of action? The best that can be done is to make an overall assessment of the context which produced the result. That context has already been described. There is nothing in the resulting picture that shows obvious signs of discrimination, arbitrariness or bad faith on

the part of the union.

Some might argue that, almost by definition, a decision by a union general membership, affecting somebody who is opposed to that particular union and is seeking to displace it, will violate some or all of the criteria having to do with the rationality of the decision-making process and of the decision itself that emerges from the process. However, that would be carrying cynicism about the fairness of direct democracy to an unacceptable extreme. In the Board's opinion, there is nothing wrong per se with a system under which the whole membership decides whether a matter will go to arbitration. Of course, the system can work perversely; any system can.

With direct democracy, there is the potential for a meeting to degenerate into a mob scene and to spawn a highly irrational conclusion simply because those present don't like somebody or what he stands for and have chosen to ignore the real merits of an issue affecting him. But there is no evidence that such happened in this case."

(pages 167; and 14,551-14,552)

Both Mr. Charlebois and Mr. Wood testified to the effect that there were hostile comments made about the former, particularly at the November 12 evening meeting. It is not surprising that he was well known to his fellow members, because he had always played an active part in support of the ATU's rival, the ICTU, and it is also not surprising that some union members might dislike him for that. But there is no evidence that that is why they went against him. On the other hand, having regard to the evidence as a whole - and also to the fact that all who testified (including Mr. Wood) were partisans to some degree or the other of the ICTU or the ATU - the Board believes that Mr. Charlebois' and Mr. Wood's claims of overt hostility at the November 12 meeting should be discounted to a considerable degree. It is no less reasonable to assume that Mr. Charlebois' work history at OC Transpo, which was detailed at the meeting via the legal opinion and the

question and answer session, prompted a degree of hostility toward him as much as any other factor.

Towards the end of October 1991, after the union's new collective agreement with OC Transpo had been settled, a special levy of \$78.12 was announced, to be taken on November 7 out of the pay of all members of the bargaining unit, to defray the expenses of recent arbitrations. A notice dated October 28, 1991 and containing the following was brought to the attention of all members:

"ARBITRATIONS: Recently your union has been involved in an extraordinary number of arbitrations, all approved by this membership. Many of which involved lengthy hearings. Two of the most recent were dismissals and in both cases the union was successful in returning the members to work. But to present a good legal case is an expensive task with some individual arbitrations costing our union over \$30,000.00

When the membership votes to proceed to arbitration, (and all arbitrations must be approved by the membership), they are also automatically approving a special dues collection. (see article 21.15, page 69 of our constitution.

Although these costs have strained your local financially, your Executive Board decided to with-hold collecting these arbitration dues until the contract was settled, when the members could better afford it. It should also be mentioned that all (and more) of our budgeted monies for legal advice was either used fighting the company over contract violations or defending your union from attacks from it's own members.

As explained at the regular monthly meeting in September, never before has our local had so many arbitrations, such expensive legal battles with the company or the expensive court costs in defending this local against dissident members.

The amount collected will be \$78.12 and will be collected from all members of 279, including Para-Transpo. This will raise just under \$150,000.00 and will be sufficient to eliminate all outstanding debt created by these arbitrations.

[sic]"

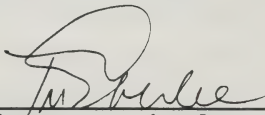
According to Mr. Wood, this notice "upset" employees and was one of the reasons why they voted against Mr. Charlebois. Certainly, if the claim by the latter is true, and we have no reason to doubt it, that somebody shouted words to the effect that he wasn't worth \$30,000, then the cost of taking Mr. Charlebois' grievances to arbitration may well have been a major factor in the minds of one or more persons in deciding to vote "no." On the other hand, there is nothing by definition discriminatory or arbitrary in somebody deciding that it would be an undue financial burden upon him to pursue a grievance on somebody else's behalf, despite what counsel might opine about the chances of success. Such a decision is not particularly philanthropic, but it cannot be said to be per se contrary to the Code. Moreover, the union's financial situation was a fact and the implication that somehow the union was at fault in making known the situation just when it did, which happened to be contemporaneous with consideration of the Charlebois grievances, is not evidence in support of the complaint here. In the final analysis, the Board and nobody else really knows why democracy worked the way it did in the case of Mr. Charlebois.

But that does not warrant the Board coming to the conclusion that the union, in the absence of its being able to say convincingly why the particular decision was made here, is guilty of violating section 37. That would be an improper reversal of the onus. After all, the onus is on the complainant to bring the Board to conclude, on a balance of probabilities, that the evidence shows the union's conduct was contrary to section 37.

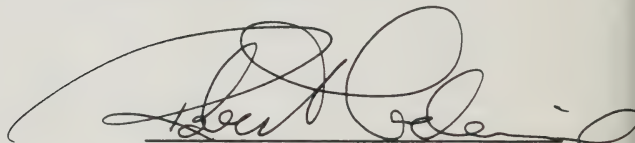
In this case, the evidence is simply not present. As has

been stated, the union's handling of the grievances up to November 12 cannot be criticized. The conduct of the union leadership in the union meetings on November 12 and 13 and the carrying out of the secret ballot vote were both within proper bounds. The union membership decided not to send the grievances to arbitration. This is why Mr. Charlebois filed his complaint. If the membership had voted in the other direction, Mr. Charlebois would not have come before the Board. But nobody would have been any the wiser about why that was the outcome than they are about why the membership said "no" to him. When the whole context is examined in this case, there is no real evidence that the union's decision was based upon reasons contrary to section 37.

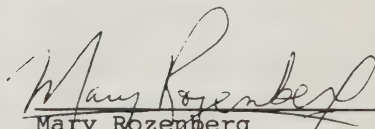
The result is that the Board is forced to the conclusion that it must dismiss the complaint.



Thomas M. Eberlee
Vice-Chairman



Robert Cadieux
Member of the Board



Mary Rozenberg
Member of the Board

ISSUED at Ottawa, this 3rd day of February 1993.

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Information

This is not an official document.
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used for legal purposes.

Summary

MARTIN J. DOYLE, APPLICANT,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
CERTIFIED BARGAINING AGENT, AND
CANADIAN AIRLINES INTERNATIONAL
LIMITED, EMPLOYER

Board File: 660-18

Decision No.: 990

These reasons deal with an application for an exemption from paying union dues on religious grounds pursuant to section 70(2) of the Canada Labour Code (Part I - Industrial Relations). The applicant who is a devout Roman Catholic objects to paying union dues to a trade union that is affiliated with the Canadian Labour Congress because of the Congress' stated policies which support pro-choice on the issue of abortion.

The application was dismissed. In its reasons the Board reviews the Board's policies and practices regarding applications of this nature and reaffirms that there must be compelling reasons before the Board will grant such an exemption order. To qualify, applicants must satisfy the Board that their religious beliefs and convictions are genuine and so strongly held that their employment would be in jeopardy if the exemption were not granted.

In this case, the Board found that there was insufficient nexus between the applicant and the Canadian Labour Congress' policies on abortion to warrant an exemption. The Board also observed that this whole question of trade unions giving financial support to social or political causes has been well settled by the Supreme Court of Canada in Lavigne v. Ontario Public Service Employees Union (1991), 91 CLLC 14,029 and that such claims do not form grounds for an exemption from paying union dues under section 70(2) of the Code.

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Seuls les Motifs de décision peuvent
être utilisés à des fins juridiques.

Résumé de Décision

MARTIN J. DOYLE, REQUÉRANT,
ASSOCIATION INTERNATIONALE DES
MACHINISTES ET DES TRAVAILLEURS DE
L'AÉROSPATIALE, AGENT NÉGOCIATEUR
ACCREDITÉ, ET LIGNES AÉRIENNES
CANADIEN INTERNATIONAL LTÉE,
EMPLOYEUR

Dossier du Conseil: 660-18

Décision n° 990

Les présents motifs traitent d'une demande d'exemption de paiement des cotisations syndicales en raison de motifs religieux fondée sur le paragraphe 70(2) du Code canadien du travail (Partie I - Relations du travail). Le requérant, un catholique pieux, s'oppose à payer des cotisations syndicales à un syndicat qui est affilié au Congrès du travail du Canada parce que ce dernier s'est déclaré ouvertement en faveur du mouvement pro-choix sur la question d'avortement.

La demande est rejetée. Dans ses motifs, le Conseil revoit la politique et les pratiques du Conseil concernant les demandes de ce genre et réaffirme qu'il doit exister de sérieuses raisons pour qu'il accorde une telle exemption. Pour l'obtenir, les requérants doivent convaincre le Conseil que leurs croyances et convictions religieuses sont authentiques et si fortes que leur emploi pourrait être en péril si l'exemption n'était pas accordée.

Dans cette affaire, le Conseil juge qu'il n'y a pas suffisamment de lien entre le requérant et les politiques du Congrès du travail du Canada sur l'avortement pour justifier une telle exemption. Le Conseil fait également remarquer que toute cette question de syndicats qui apportent leur appui financier à des causes sociales ou politiques a été réglée par la Cour suprême du Canada dans Lavigne v. Ontario Public Service Employees Union (1991), 91 CLLC 14,029, et que de tels arguments ne justifient pas une exemption de paiement des cotisations syndicales fondée sur le paragraphe 70(2) du Code.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

Reasons for decision

Martin J. Doyle,

applicant,

International Association of
Machinists and Aerospace
Workers,

certified bargaining agent,

and

Canadian Airlines
International Limited,

employer.

Board File: 660-18

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Martin J. Doyle, for himself;

Leo McGrady, for the certified bargaining agent;

No one appeared for the employer.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

This application for exemption from paying union dues on religious grounds was filed with the Board by Mr. Martin J. Doyle (the applicant) on December 9, 1991. The thrust of the application is that the applicant, being a devout Roman Catholic, objects to paying union

dues to a trade union that is affiliated with the Canadian Labour Congress (the CLC) because of the CLC's stated policies which support pro-choice on the issue of abortion.

This matter was originally scheduled to be heard by the Board in August 1992; however, the hearing was postponed at the request of the applicant to allow him to seek legal advice. The application was eventually heard at Calgary on December 3, 1992.

II

The applicant is employed as a mechanic by Canadian Airlines International Limited (CAIL) and was so employed by Pacific Western Airlines prior to the merger of those and other airlines which now make up CAIL. The applicant is represented for collective bargaining purposes by the International Association of Machinists and Aerospace Workers (IAM or the union). The collective agreement between the IAM and CAIL provides for payment of union dues by all employees in the bargaining unit to the IAM. There is no requirement in the agreement for employees in the bargaining unit to become members of the union. Consequently, the applicant has paid union dues to the IAM for many years but he has never been a member of the union.

According to the information on file, the union has represented the applicant on several occasions in disciplinary matters over the years and more recently, on January 17, 1992, the union presented a case at

arbitration on the applicant's behalf relating to harassment in the workplace. There are also indications in the written pleadings that the applicant took a libel action against the union after a strike by the IAM against Pacific Western Airlines in 1985/86, when he was apparently subjected to the wrath of the union and of his fellow workers for working during the strike. This action is presently under appeal. (It should be made clear that the applicant's refusal to participate in that strike had nothing to do with his religious convictions.)

In his application to the Board, which was dated December 4, 1991, the applicant stated that he had recently become aware that his union dues could be directed to a charity if these monies were used for purposes which are contrary to his religious beliefs. He enclosed copies of correspondence which he said confirmed the use of his union dues for a cause that he could not support. These included a copy of a letter on Canadian Labour Congress letterhead dated November 9, 1989, over the signature of President Ms. Shirley Carr. The letter stated in part:

"...The policy of the Canadian Labour Congress, for many years now, has been in support of a pro-choice position on the issue of abortion. This policy clearly states that abortion should be removed from the criminal code and that women should have access to abortion and the right to make that choice. In addition to this, the Canadian Labour Congress has stressed the importance of extensive public education programs pertaining to birth control and the provision of sex education and family like courses.

I am enclosing a copy of the resolution that was passed at our 1988 Convention held in Vancouver."

The applicant also enclosed a copy of the resolution that was referred to in the above letter along with a copy of a document showing that the IAM, as an affiliate of the CLC, had paid in excess of \$250,000.00 in per capita fees to the CLC in each year of a two year period.

At the hearing, the applicant presented evidence through the testimony of Father Thomas Mohan regarding the anti-abortion teachings and philosophy of the Roman Catholic Church. The applicant also testified on his own behalf about his religious beliefs and convictions and explained the conflict that he said he was enduring knowing that his union dues were being used to support the pro-choice abortion policies of the CLC. He could not, however, tell us about any active role he had played in the pro-life movement in the church or elsewhere, nor could he go as far as to confirm that he would seriously consider leaving his job if he had to continue paying dues to the IAM. He claimed that he had simply not yet turned his mind to the consequences of the Board turning down his application.

III

The relevant provision of the Code is section 70(2):

"70.(2) Where the Board is satisfied that an employee, because of his religious conviction or beliefs, objects to joining a trade union or to paying regular union dues to a trade union, the Board may order that the provision in a collective agreement requiring, as a condition of employment, membership in a trade union or requiring the payment of regular union dues to a trade

union does not apply to that employee so long as an amount equal to the amount of the regular union dues is paid by the employee, either directly or by way of deduction from his wages, to a registered charity mutually agreed on by the employee and the trade union."

For our purposes here we need only refer to two previous Board decisions on this topic which set out the Board's policies and practices when dealing with applications of this nature. These are: Richard Barker (1986), 66 di 91; 13 CLRBR (NS) 28; and 86 CLLC 16,031 (CLRB no. 576); and Murray Wiebe (1987), 70 di 89; 18 CLRBR (NS) 241; and 87 CLLC 16,032 (CLRB no. 632).

In Richard Barker, *supra*, which was the first decision of the Board under the then section 162(2) of the Code (now section 70(2)), the Board embarked upon a review of the approach taken by Provincial Boards such as Ontario, British Columbia, Manitoba, and Saskatchewan where similar legislative provisions exist. The Board then adopted a four-fold test which it said it would apply to determine the bona fides of applications for exemption from provisions in collective agreements requiring union membership or mandatory payment of union dues on the basis of religious objections. These tests were set out as follows:

"(1) The applicant must object to all trade unions, not just to a particular trade union."

Like the conscientious objector who must be opposed to 'any and all wars', the applicant must object to any and all trade unions.

"(2) The applicant does not have to rely on some specific tenets of a religious sect to base his objection."

In the same manner as the British Columbia and Ontario Boards, we believe it is not for us to disqualify some convictions because they are personal to the applicant. While it will be easier for the latter to convince the Board that his belief is 'religious' when this belief forms part of the dogma of a sect, we believe we would misconstrue section 162(2) if we were to get involved with religious orthodoxy.

(3) An objective inquiry must be made into the nature of the applicant's beliefs in the sense that they must relate to the Divine or man's perceived relationship with the Divine, as opposed to man-made institutions. For our purposes, a religious conviction or belief should be construed as the 'recognition on the part of man of some higher unseen power as having control of his destiny, and as being entitled to obedience, reverence and worship' (Regina v. Leach, Ex parte Bergsma, [1965] 2 O.R. 200 (Ont. H.C.J.), page 213). By the way, this test has been used not only in British Columbia but in all the latest cases of the Ontario Board.

(4) Finally, the applicant must convince the Board that he is sincere and that he has not rationalized his objections to the union on religious grounds after he was made aware of the provisions of the Code."

(Richard Barker, supra, at pages 107-108; 45; and 14,288)

In Murray Wiebe, supra, the Board went on to say that there is more to these applications than simply ticking off a check-list which may indicate that an applicant has a religious conviction or belief that causes him or her to object to paying union dues or to becoming a member of a trade union. Considering the overall purposes of the Code and, in particular, the principle behind what is known as the Rand Formula, which is permitted in collective agreements under the Code vis-à-vis automatic dues deduction from all employees in a bargaining unit who benefit from the representation services provided by a trade union, the Board said that it must be satisfied that the beliefs and convictions relied upon must be so compelling that

the applicant could no longer continue in his or her employment if the exemption were not granted. In that case, the Board refused to grant the exemption sought, notwithstanding that the applicant Mr. Wiebe appeared to meet all of the tests set out in Richard Barker. The Board was of the view that Mr. Wiebe's objection to paying union dues was more of a strong preference than a compelling necessity.

In summary, the Board's approach then is that exemptions will only be granted under section 70(2) of the Code when there are compelling reasons for so doing. To qualify for such an exemption, applicants must satisfy the Board that their religious beliefs or convictions are genuine and so strongly held that the conflict between those beliefs and convictions and to joining or to paying dues to a trade union are such that their jobs would be placed in jeopardy if the exemptions were not granted.

In addition to the compelling necessity, applicants must satisfy the Board that they are opposed to all trade unions and they must be able to convince the Board that their claim to religious objections do not conceal resistance of another nature to the principles of collective bargaining which are embedded in the Code.

The basis for the religious beliefs or convictions must relate to the Divine and, while it may be persuasive if they are, it is not necessary that opposition to trade unions be founded on the tenets of a known religion.

Applicants must also convince the Board that they have not rationalized their objections to trade unions on religious grounds after becoming aware of the provisions of section 70(2) of the Code.

IV

Looking at the grounds that the applicant relies upon here within the framework of the foregoing established Board policies and practices, it quickly becomes apparent that the application cannot succeed. To begin with, we are satisfied that there is no compelling need here for an exemption from paying union dues. The applicant has paid dues to the IAM for many years and has managed to continue working for over a year now since he claims that he became aware of the CLC policy regarding abortions. Having heard the applicant, we are convinced that this application is but one more episode in his ongoing battle with the union and that his job will not be in jeopardy vis-à-vis his religious convictions should he have to continue contributing financially to the union.

The applicant, by his own admission, is not opposed to all trade unions nor to the principles of collective bargaining. This was confirmed not only by his response to questions at the hearing, it was also displayed in documents that were placed before us wherein the applicant has written positively about the virtues of collective bargaining. This means of course that he does not even meet the first test which the Board normally applies to applications like this.

As for the second and third tests, which relate to the applicant's religious beliefs, there is really nothing at issue here. Nowhere in these proceedings has there been any challenge or any attempt to demean or to diminish the depth or the sincerity of the applicant's religious convictions. Nor was there any effort made to argue with his anti-abortion beliefs. These matters were a given. However, it must be pointed out that there is apparently nothing in the teachings of the Roman Catholic Church that prohibits members from joining or paying dues to a trade union. In fact to the contrary, Father Mohan candidly admitted that the Church favours the principles of collective bargaining and he confirmed that it actually encourages its members to participate in this forum as a means to better their lot in life.

For the purposes of this application, therefore, there is nothing in either the applicant's personal religious convictions or beliefs or in the teachings of his Church which prohibits him from participating in labour relations either by way of membership in a trade union or by contributing financially by way of union dues vis-à-vis the principles of collective bargaining as they are written in the Code. His opposition to paying union dues is limited strictly to his perception that some of his dues are being used to support the pro-choice movement by virtue of the CLC policies. On the basis of the evidence before us, this pro-choice stand by the CLC is so remote from the applicant, his employment and the bargaining agent role of the IAM, that it cannot, with respect, be considered as valid grounds for an exemption from paying union dues under section 70(2) of the Code.

Furthermore, this whole issue of trade unions giving financial support to social or political causes or spending money on things that are not directly related to labour relations or to the representation of employees has been well settled by the Supreme Court of Canada in Lavigne v. Ontario Public Service Employees Union (1991), 91 CLLC 14,029. In view of the findings in that decision, which we need not go into, we are of the opinion that claims like these by the applicant do not form grounds for an exemption from paying union dues under section 70(2) of the Code.

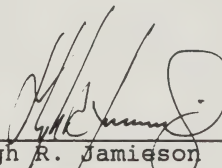
If we are wrong in adopting that view, the application must fail in any case because, as we have pointed out, the applicant cannot meet the Board's established tests. Nor can he show a sufficient linkage between himself and the alleged offending policy.

The undisputed evidence before us was that the union is not directly affiliated with the CLC, nor does it pay per capita fees directly to that body. Apparently the IAM, whose jurisdiction is nationwide, is a member of the provincial federation of labour in each province, i.e., in Alberta where the applicant works, the union is a member of the Alberta Federation of Labour (the AFL). It is through the AFL that the union in Alberta is affiliated with the CLC and it is the AFL that pays the per capita fee to the CLC. In other words, the union to which the applicant pays unions dues is twice removed from the CLC and its policies. When one pulls all of that together, the pro-choice policy of the CLC is indeed far removed from the applicant, his union dues and what he calls his right to religious freedom.

Moreover, there was further irrefutable evidence that the IAM is not bound by CLC policy regarding abortion in any way. The union's own stand on this subject is that it leaves the question entirely to the conscience of each individual member. It was telling to us that this evidence was given by Mr. William Farrell, President and General Chairman of the IAM who also happens to be a Roman Catholic and who holds strong anti-abortion views.

In the circumstances, even if he could get past the test of having to object to all trade unions, there is simply insufficient nexus here between the applicant as an individual and the CLC's public stand on abortion to justify an exemption from the general rule that calls for payment of union dues by everyone in the bargaining unit who is affected by the IAM collective agreement.

Having so found, the application is dismissed accordingly.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 11th day of February, 1993.

information

Publications

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Summary

General Teamsters, Local Union No. 362 of the International Brotherhood of Teamsters, applicant union, and Time Air Inc., employer.

Board File: 555-3496

Decision No.: 991

Application for certification filed pursuant to sections 24, 27 and 28 of the Canada Labour Code (Part I - Industrial Relations). Challenge to Board constitutional jurisdiction and to appropriateness of bargaining unit sought.

The Board finds that it does have constitutional jurisdiction over the commissary employees of the employer under section 4 as these operations are an integral part of the employer's business.

The Board determines that the unit sought is appropriate for collective bargaining in the circumstances of this case.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Résumé

Section locale 362 de la Fraternité internationale des Teamsters, syndicat requérant, et Time Air Inc., employeur.

Dossier du Conseil: 555-3496

Décision n° 991

Demande d'accréditation présentée en vertu des articles 24, 27 et 28 du Code canadien du travail (Partie I - Relations du travail). Contestation de la compétence constitutionnelle du Conseil et de l'habileté à négocier collectivement de l'unité visée.

Le Conseil juge qu'il a la compétence constitutionnelle à l'égard des employés affectés au service d'approvisionnement de l'employeur en vertu de l'article 4, puisque les activités en question constituent une partie intégrante de l'entreprise de l'employeur.

Le Conseil estime que, dans les circonstances de la présente affaire, l'unité visée est habile à négocier collectivement.



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**LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.**

Reasons for decision

General Teamsters, Local
Union No. 362 of the
International Brotherhood
of Teamsters,

applicant union,

and

Time Air Inc.,

employer.

Board File: 555-3496

The Board was composed of Mr. J. Philippe Morneault, Vice-Chairman and Mr. Michael Eayrs and Ms. Mary Rozenberg, Members.

Appearances (on the record)

Mr. Roy A. Finley, Secretary-Treasurer, General Teamsters, Local Union No. 362, for the applicant; and

Mr. D.R. Laird, Q.C., for the employer.

These reasons for decision were written by Mr. J. Philippe Morneault, Vice-Chairman.

I

This is an application filed pursuant to section 24 of the Canada Labour Code (Part I - Industrial Relations) by the General Teamsters, Local Union No. 362 of the International Brotherhood of Teamsters (the union or the applicant), for certification as bargaining agent for a unit of seven commissary employees of Time Air Inc. (the employer) employed at the Edmonton Municipal Airport.

This application comes on the heels of two similar applications filed by related unions in respect of units of commissary employees of the employer at its Vancouver and at its Calgary bases, both of which were granted by differently constituted Board panels without reasons being issued. The employer has made application to the Federal Court of Appeal for review of each of the foregoing decisions. As in the two applications referred to above, the employer objects to this application on two grounds, namely that the Board is without constitutional jurisdiction to certify the applicant and that the bargaining unit sought does not constitute a unit appropriate for collective bargaining.

As is the frequent practice in certification applications, the Board met on October 7, 1992, considered the investigating officer's report, the material on the file and the submissions of the parties and, without a public hearing, proceeded to dispose of the case. In the instant case, the Board decided that it would certify the union as bargaining agent for the unit sought. Because the employer had raised similar issues in the two previous similar certification cases (Vancouver and Calgary), the Board decided to issue reasons for its decision in the instant case.

II

The employer has commissary operations at four separate locations: Vancouver, Calgary, Saskatoon and Edmonton. The commissary employees who work at Vancouver and Calgary are covered under the separate certifications noted above. The commissary employees who work at its Saskatoon base are not represented.

The employer's commissary operations are similar at each of its bases and may be briefly described as follows. The work of commissary agents consists primarily of loading commissary supplies onto company aircraft at their respective ramp area and unloading unused commissary items for return to the commissary. Refuse is also off-loaded from the aircraft and placed in refuse bins on the ramp. This work at the ramp comprises the major portion of a commissary agent's working day. When not at the ramp, the employees are back at the commissary facility restocking their trucks for the next trip to the ramp and unloading unused commissary items which have been removed from aircraft. While at the commissary facility, the employees would also prepare coffee and hot water, make up cheese trays and fill carrying coolers with ice; however, no food or meal preparation per se is carried out.

The only personal contacts and working relationships of any significance between commissary employees and other occupational groups at Time Air Inc. are those which occur with flight attendants. These are very brief. Other contacts occur primarily with Operations Control and Maintenance Control personnel, usually by radio phone over the commissary truck radios.

Contacts and working relationships between commissary employees of one base with another or other bases occur very infrequently. When they do, they for the most part take the form of computer contacts between the respective commissaries. Such contacts would arise, for example, in circumstances where one base might run out of a particular commissary item or items and would requisition a supply of such item or items from a sister base. This computer contact and follow-up telephone contact if necessary are

undertaken by the lead commissary agent.

Prior to the previous two certifications, the wage and benefit package was the same for commissary employees at all four bases with only some variance between benefits paid to full-time as opposed to part-time and casual employees.

III

The employer's argument that the Board is without constitutional jurisdiction is based on the operational and geographical isolation of the commissary employees. That, says the employer, coupled with the fact that commissary employees do not perform work which can be characterized as vital, essential, necessarily incidental, or integral to aeronautics, means that these employees' functions cannot be characterized as an activity carried on by the employer as an integral part of its airline operation. The employer relied on the Board's decision in Baron W. Lewers (1982), 48 di 83; and 82 CLLC 16,179 (CLRB no. 372).

With respect to the appropriateness for collective bargaining of the unit sought by the union, the employer argues that determining that separate units of commissary employees at the various locations where they are employed by the employer are appropriate runs counter to the Board's decision in Intair Inc. et al., March 13, 1992 (LD 1003).

The employer further argues that if this application is granted it will result in three separate commissary employee bargaining units and still not cover all its commissary employees. It says that if the Board grants this application, less than 5% of its work-force will account for 60% of the bargaining units in place at Time Air Inc.

The employer is also concerned with what it calls the ability of a very small group of employees to disrupt its overall operations given that each location is an integral part of a functional whole and the viability of that functional whole is dependent on the various support services provided at each location.

The employer is also referring to the Board's statement of a general policy of avoiding a multiplicity of bargaining units with specific reference to the aviation industry as set out in Air Canada (1980), 42 di 114; and [1981] 2 Can LRBR 153 (CLRB no. 277).

IV

The Canada Labour Code (Part I - Industrial Relations) by section 4 thereof which states:

"4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers"

gives jurisdiction to the Board in respect of employees who are employed on or in connection with the operation of any

federal work, undertaking or business.

In section 2 of the Code, a federal work, undertaking or business is defined in part as follows:

"'federal work, undertaking or business' means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(e) aerodromes, aircraft or a line of air transportation, ..."

Consequently, there is absolutely no doubt that the Board has constitutional jurisdiction over the core undertaking of this employer. There may be, however, certain instances in which the Board might not consider that it has jurisdiction over some part or parts thereof. If, for example, the employer were conducting its business by purchasing the commissary services in question from a third-party employer, this might result in such operations being categorized as not federal. This is what happened in Lewers, supra. Or, the employer, while its core business or undertaking is under federal jurisdiction, might start a separate business which falls under provincial jurisdiction. For this to occur, however, the business in question must constitute a distinct severable undertaking from the employer's core undertaking and the business in question must not form an integral part of or be vital to the employer's core undertaking. This was seen in Brink's Canada Limited et al. (1991), as yet unreported CLRB decision no. 911. In such a case, not only must the business in question and the core federal undertaking be severable but they must be severed. They must be able to

stand as independent businesses. Such is not the case in the present situation. The Board therefore concludes that it has jurisdiction pursuant to section 4 of the Code to deal with this application.

When dealing with applications for certification, the Board has the power and the discretion to determine an appropriate bargaining unit. This is contained in section 16(p)(v):

"16. The Board has, in relation to any proceeding before it, power

...

(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether

...

(v) a group of employees is a unit appropriate for collective bargaining, ..."

and in section 27(1):

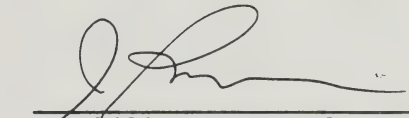
"27.(1) Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining."

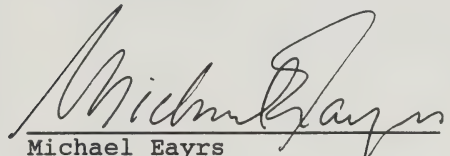
In the numerous decisions that the Board has issued dealing with the appropriateness of bargaining units, whether they be applications for certification or applications for review of bargaining units, the Board has always jealously guarded its discretion to find the unit appropriate for collective bargaining in the circumstances of the case

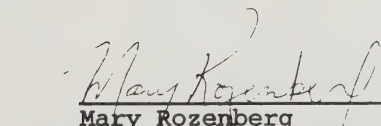
before it. In so doing the Board has identified a large number of criteria it will consider when determining what is an appropriate bargaining unit. Needless to say, not all of these criteria are applied nor are they applicable to any single case. Some of the criteria favour smaller bargaining units while some favour broader bargaining units; some are more applicable to a first time certification while some apply more appropriately to a review of bargaining units. Moreover, the criteria finally applied in any given case may be weighted differently than when they are applied in another case. The Board has always maintained that it did not have to determine the ideal unit, but only one which is an appropriate unit. The whole determination always depends on the facts of each particular case.

As it was seen in Royal Bank of Canada v. S.O.R.W.U.C., file no. A-849-77, October 4, 1978, (F.C.A.), the duty of the Board is neither to facilitate nor to hinder the certification of unions. However, the Board may exercise its discretion so as to give employees a realistic possibility of exercising their rights under the Code. While the Board has generally expressed a strong preference for large, all-employee industrial bargaining units, it has always had to balance that preference against giving employees a realistic and meaningful possibility of exercising their freedom of association under the Code.

In the instant application the Board determines that the unit of employees sought by the union is appropriate for collective bargaining and, being satisfied that, as of the date of the application, a majority of the employees in the unit wish to have the union represent them, certifies the applicant union as bargaining agent for the bargaining unit named in the certificate issued.


J. Philippe Morneau
Vice-Chairman


Michael Eayrs
Member of the Board


Mary Rozenberg
Member of the Board

ISSUED at Ottawa, this 15th day of February 1993.

information

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be used for legal purposes.

Summary

Jose Furtado, complainant, Canadian Union of Public Employees, Broadcast Division (Production Unit), respondent union, and Canadian Broadcasting Corporation, employer.

Board File: 745-4199

Decision No.: 992

A person who had been employed by the Canadian Broadcasting Corporation as an assistant set designer in a temporary position complained that the Canadian Union of Public Employees, Broadcast Division (Production Unit), had violated section 37 of the Canada Labour Code (Part I - Industrial Relations) - the duty of fair representation provision - in its handling of his grievance against early termination of that employment.

The Board found that there had been no breach of section 37 and that the union's behaviour had been on all fours with the principles enunciated by the Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043, which should govern a union's duty of representation in respect of a grievance.

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peuvent être utilisés à des fins
juridiques.

Résumé

Jose Furtado, plaignant, Syndicat canadien de la Fonction publique, Division de la radio-télévision (unité de la production), syndicat intimé, et Société Radio-Canada, employeur.

Dossier du Conseil: 745-4199

Décision n° 992

Une personne qui a été embauchée par la Société Radio-Canada en tant qu'assistant décorateur pour une période déterminée s'est plaint que le Syndicat canadien de la Fonction publique, Division de la radio-télévision (unité de la production), avait enfreint l'article 37 du Code canadien du travail (Partie I - Relations du travail) - la disposition portant sur le devoir de représentation juste - lorsqu'il avait traité le grief du plaignant concernant sa mise à pied prématurée.

Le Conseil a jugé qu'il n'y avait pas eu violation de l'article 37 et que le comportement du syndicat respectait les principes énoncés par la Cour suprême du Canada dans Gilde de la marine marchande du Canada c. Guy Gagnon et autre, [1984] 1 R.C.S. 509; (1984), 9 D.L.R. (4th) 641; et 84 CLLC 14,043, qui portent sur le devoir de représentation d'un syndicat en matière de griefs.

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**LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.**

Reasons for decision

Jose Furtado,

complainant,

and

Canadian Union of Public
Employees, Broadcast Division
(Production Unit),

respondent union,

and

Canadian Broadcasting
Corporation,

employer.

Board File: 745-4199

The Board consisted of Mr. Thomas M. Eberlee, Vice-Chairman, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances

Mr. Elliott G. Posen, for the complainant, Jose Furtado;
and

Mr. J.J. Nyman, for the respondent union, Canadian Union of
Public Employees, Broadcast Division (Production Unit).

These reasons for decision were written by Vice-Chairman
Eberlee.

At a hearing held in Toronto on January 12 and 13, 1993,
the Board enquired into a complaint by Jose Furtado that
the Canadian Union of Public Employees, Broadcast Division
(Production Unit) (CUPE), had breached section 37 of the
Canada Labour Code (Part I - Industrial Relations) in its

handling of his grievance against his termination as an employee of the Canadian Broadcasting Corporation (CBC). The complaint, which was filed on March 27, 1992, alleged that on or about January 9, 1992, Mr. Furtado was dealt with by Len Carter, chief steward of Local 667 of CUPE, contrary to section 37 "in that he [Mr. Carter] did on his own behalf, or on behalf of the respondent, withdraw the complainant's grievance without settlement, and without discussion with the complainant." The union replied in essence there was nothing in the collective agreement that could support Mr. Furtado's claim for reinstatement but that, despite this, it had done everything possible to assist him and had kept him fully informed of developments regarding the progress of his grievance.

Pursuant to provisions of the Code and the Regulations, the Board appointed a senior labour relations officer to investigate the matter and to assist the parties toward a settlement. No settlement was achieved; the Board therefore scheduled the complaint for a hearing.

II

Mr. Furtado had worked for the CBC as an assistant art director for a short term in 1990. During July 1991, he saw a notice posted on a CBC bulletin board which invited applications for a position as assistant set designer for a temporary period ending on December 31, 1991 for the television program, "Material World." The posting specified that the job was located in Toronto, was in "Group 7," had a certain salary range and its "affiliation" - meaning bargaining unit - was "CUPE PROD" - meaning CUPE Production Unit.

Mr. Furtado applied and was engaged for the position. He was told verbally more than once that his employment would end January 31, 1992. This date was confirmed both on the staff pass issued by the employer to him and via a "design estimate" for the program, a copy of which was given to him. Mr. Furtado was a temporary employee, within the meaning of article 14 of the collective agreement between the CBC and CUPE for the production unit. As a temporary employee he was "one hired for a specific purpose and for a limited time" - less than one year, except with the consent of the union. Article 14.3 of the agreement requires the CBC to tell the employee in writing at the time of hiring "the intended duration of employment."

Nothing in writing relating specifically to this Article 14.3 requirement was given to Mr. Furtado by CBC management and he made no request for such a document at the time. On the other hand, there could have been no doubt in his mind (and this was the tenor of his testimony at the hearing) that the CBC did not intend to use his services beyond January 31, 1992.

While a person may obtain temporary employment as per Article 14.3 and that employment may be intended to run for a stated maximum term, the Article gives the CBC power to cut it off at any time before its intended termination simply by giving at least 10 working days' notice or pay in lieu. Mr. Furtado, as a free-lancer in the television industry, fell victim to this power.

On September 27, 1991, Mr. Furtado received a telephone call from a CBC official who advised him that his job would be ending after another two weeks. The same day, he

received a letter from the CBC advising him that, "due to changed operational requirements of the Design Department and the Program Material World," his services would not be required as of October 11, 1991.

Mr. Furtado told the Board that when he accepted the term position with the CBC, he had no idea that it might end prematurely. Had he suspected that would be the case, he would probably not have accepted the work, for he had other job prospects at the time which were better or longer than the CBC job had now proven to be. He felt that the CBC had acted improperly toward him.

After a number of contacts with persons at the CBC, Mr. Furtado was finally referred to the union early in November. He told the Board that until this time he was not aware that his job had been covered by a collective agreement and that the bargaining agent was CUPE. He stated that he had not been able to obtain a copy of the agreement until late November. (In the light of the fact, however, that the original job posting, which Mr. Furtado saw and on the basis of which he applied for the job, had clearly indicated that the "affiliation" was CUPE, no blame can be ascribed to the union or to the CBC for his failure of awareness in this respect or for his not being in possession of a copy of the agreement until late November.)

Following consultation with his legal counsel, he contacted the union. There was some dispute during the course of the hearing as to whether chief steward Len Carter responded immediately to his call or whether Mr. Furtado had to call more than once before reaching him and whether Mr. Carter returned all of Mr. Furtado's calls. Mr. Carter is a full-

time CBC employee who acts as a CUPE official on a part-time basis. Hence it is not surprising that he might not be too easy to reach at the CUPE office. The fact is that Mr. Furtado was able within a few days to contact Mr. Carter and he told him what had happened. Nothing turns on the difficulties Mr. Furtado may have experienced in contacting Mr. Carter.

It was not until December 5, according to Mr. Furtado, that he actually told Mr. Carter he had not received anything in writing notifying him of the intended duration of his job. On or about December 9, 1991, Mr. Carter met Bruce May, also a full-time CBC employee, who is president of the Toronto local 667 of CUPE's production unit and national president of the Canadian Broadcast Employees' Union of CUPE. Mr. Carter joined their meeting about an hour later. Mr. Furtado outlined the whole story at this meeting. There is no doubt in the Board's mind that Messrs. May and Carter received a complete picture of the issues as Mr. Furtado saw them.

He told them that the CBC had an obligation to inform him of the circumstances of his employment, that it had not done so and had ended his work prematurely, thereby depriving him of other job opportunities. He testified that Messrs. May and Carter told him the CBC had not breached the collective agreement since it did have the right to end temporary employment on 10 days' notice regardless of the earlier expected or intended duration of the term. Mr. Furtado disagreed. He maintained that the CBC had violated the agreement by not giving him a letter at the time he was hired setting out the then intended duration of employment, which was to January 31, 1992.

(This, the Board notes, notwithstanding the fact that he had been told verbally and even had it in writing on his staff pass that his term was intended to run to January 31, 1992.)

In spite of their doubts (which strike the Board as being not unreasonable under the circumstances), Messrs. May and Carter agreed to prepare a grievance for Mr. Furtado. This was done and Mr. Furtado signed it on December 12, 1991. He grieved:

"... that the CBC has violated the collective agreement by terminating my employment on October 11, 1991 after verbally promising on August 12th, 1991 that my employment would continue until January 31, 1992.

I further grieve that the Corporation has violated my rights by not confirming the intended duration of my employment in writing at the time of my hiring and by not making me aware that my employment was subject to the CBC/CUPE Production collective agreement."

The grievance stated that in order to settle the matter, the union sought admission that there had been a violation of the collective agreement plus payment to the grievor of all lost benefits and wages. In an attached "grievance fact sheet," Mr. Furtado also complained that the CBC, when it hired him, had failed to make any mention of his rate of pay. Apparently he did not think to ask; the Board notes that the job posting to which he responded quoted a range of \$35,486 to \$38,372.

Mr. Furtado testified he learned later on that the grievance had been taken up by the union with the CBC at a meeting on January 9, 1992. He had been promised by Mr. May that he would be advised of when the meeting would take

place and that he would be invited to attend. He was neither advised nor did he attend. Several days later, he learned that his grievance concerning payment of wages and other alleged losses had not been successful. The union, however, had agreed to settle his grievance on the basis that the CBC would henceforth give specific written confirmation of the intended duration of term employment and in that confirmation would mention that 10 working days' notice would also be given in the event of earlier termination. The CBC also undertook to provide a copy of the collective agreement to new term employees.

According to Mr. Furtado, there had never been any discussion about a possible settlement of his grievance. He considered that the union's action in settling without consulting him and in deciding not to pursue his financial claim constituted a contravention of section 37 of the Code, which reads as follows:

"37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them."

The evidence shows that it was not normal practice for a grievor to attend a local grievance meeting. Mr. Furtado was promised an opportunity to attend when his grievance came up. The meeting was set up at the last minute and Mr. Furtado either could not be reached or simply was not reached. In the Board's view, the union's failure to ensure his presence does not in any way contribute to any possible finding that section 37 has been breached. What

happened at the meeting is no secret. The question really is: was the union in breach of section 37 when it failed to pursue the grievance further and settled it at the meeting.

The Board was told by the union representatives that by the time contact had been made between them and Mr. Furtado and the grievance had been prepared, the claim appeared to them to be actually out of time under the various steps laid out in the collective agreement. They felt from the beginning that CBC's violation of the collective agreement had been largely technical in the sense that no specific written confirmation had been given as to the duration of Mr. Furtado's term. They also felt from the beginning, as they told Mr. Furtado, that the CBC had not breached the agreement when it gave him 10 days' notice of termination. Because of the latter consideration, as well as the apparent untimeliness of the grievance, they dwelt primarily at the grievance meeting upon the unfairness to term employees of not being told, up-front so to speak, that while there was a specified intended period of employment this could be shortened on only 10 days' notice. They considered that they had scored a victory under the circumstances by obtaining from CBC the commitment contained in the settlement.

Mr. Carter told the Board that it was his impression Mr. Furtado also wanted to be reinstated. A few days before the grievance was written up, he spoke to responsible CBC officials about the possibility of Mr. Furtado being re-employed. He was assured that the early termination had occurred only because Mr. Furtado's services were not required for as long a period as had been

originally estimated, that he was well regarded by the CBC and would certainly be rehired for work in his field when it became available.

It is clear to the Board that the union representatives were fully aware of all the issues raised in Mr. Furtado's case. They turned their minds to his grievance. They bore no hostility toward him. Their view as expressed to him at the time, that he could not expect to get the job back or win compensation because the CBC's breach of the collective agreement was basically technical in nature, was not unreasonable. Nor was their decision to "settle" the grievance on the terms indicated.

The Supreme Court of Canada in Canadian Merchant Service Guild v. Guy Gagnon et al., [1984] 1 S.C.R. 509; (1984), 9 D.L.R. (4th) 641; and 84 CLLC 14,043, sets out the following criteria which should be followed by a union in handling grievances:

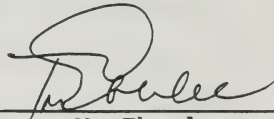
"The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. *The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
2. *When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
3. *This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*

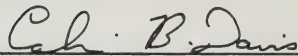
4. *The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
5. *The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."*

(pages 527; 654; and 12,188; emphasis added)

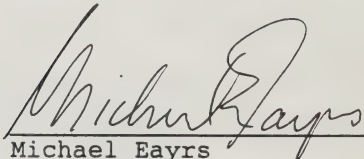
The Board finds that the union's behaviour vis-à-vis Mr. Furtado and his grievance was on all fours with these principles. The complaint is dismissed.



Thomas M. Eberlee
Vice-Chairman



Calvin B. Davis
Member of the Board



Michael Eayrs
Member of the Board

ISSUED at Ottawa, this 17th day of February 1993.

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Summary

Canada Post Corporation, applicant/respondent, Association of Postal Officials of Canada, applicant/respondent, and Public Service Alliance of Canada, respondent.

Board files: 530-1218
530-1481

Decision no.: 993

This is an interim decision rendered by the Board pursuant to section 20 of the Canada Labour Code, which explains the reasons why it is issuing an order on behalf of the Association of Postal Officials of Canada (APOC) for a supervisory unit.

After having reviewed the background of the long discussions between APOC and the Canada Post Corporation in order to come to an agreement on the appropriateness of a supervisory unit, the Board reaffirmed its exclusive jurisdiction over this matter.

The Board received written submissions from the Public Service Alliance of Canada which challenges the inclusion of 200 sales representatives in the supervisory unit.

The Board reaffirmed that when a unit is appropriate for collective bargaining and that the union has the

Résumé

Société canadienne des postes, requérante/intimée, Association des officiers des postes du Canada, requérante/intimée, et Alliance de la Fonction publique du Canada, intimée.

Dossiers du Conseil:
530-1218
530-1481

Décision n° 993

Il s'agit d'une décision partielle rendue par le Conseil en vertu de l'article 20 du Code canadien du travail expliquant les motifs pour lesquels il rend une ordonnance en faveur de l'Association des officiers des postes du Canada (APOC), à l'égard de l'unité de surveillants.

Après avoir fait l'historique des longs pourparlers intervenus entre l'AOPC et la Société canadienne des postes pour tenter de s'entendre sur l'habileté à négocier d'une unité de surveillants, le Conseil réaffirme la juridiction exclusive du Conseil en cette matière.

Le Conseil a reçu des observations écrites de la part de l'Alliance de la Fonction publique du Canada qui s'oppose à l'inclusion dans l'unité de surveillants de 200 préposés aux ventes.

Le Conseil réaffirme que lorsqu'une unité est habile à négocier collectivement et que le

support of the majority, the Board need not consider the wishes of the minority. The Board based its decision on a Federal Court judgment (Claude Latrémouille v. Canada Labour Relations Board et al., file nos. A-445-82, A-467-82, A-725-82, January 22, 1985, Pratte, J., page 15) which confirmed that the Board need not hold a vote to establish the wishes of the employees when the added employees are the minority.

Finally, the Board need not determine the ideal unit nor the most appropriate unit.

syndicat a l'appui de la majorité, le Conseil n'a pas à tenir compte des désirs de la minorité. À cet égard, le Conseil s'appuie sur une décision de la Cour fédérale (Claude Latrémouille c. Conseil canadien des relations du travail et autres, dossiers n^{os} A-445-82, A-467-82, A-725-82, 22 janvier 1985, opinion du juge Pratte, page 15) qui a confirmé la compétence du Conseil en ce qui a trait à la non-nécessité de tenir un scrutin pour établir la volonté des employés étant donné que les employés ajoutés sont en minorité.

Enfin, le Conseil n'est pas tenu de déterminer l'unité idéale ni l'unité la plus appropriée.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Canada Post Corporation
(CPC),

applicant/respondent

and

Association of Postal
Officials of Canada (APOC),

applicant/respondent

and

Public Service Alliance of
Canada (PSAC),

respondent.

Board Files: 530-1218
530-1481

The Board was composed of Mr. M. Brian Keller, Vice-Chairman, and Messrs. Victor E. Gannon and Jacques Archambault, Members.

Appearances

Mr. Robert Monette, accompanied by Ms. Mary G. Gleason, for Canada Post Corporation;

Mr. Jacques Emond, for the Association of Postal Officials of Canada; and

Mr. Andrew Raven, for the Public Service Alliance of Canada.

These reasons for decision were written by Mr. Jacques Archambault, Member.

This is an interim decision further to another decision of the Board in the same files (Canada Post Corporation (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675)). In that decision, the Board had determined the number of bargaining

units appropriate for collective bargaining at Canada Post Corporation (CPC).

This interim decision is also further to another Board decision dated December 12, 1989 (Canada Post Corporation (1989), 79 di 35; and 90 CLLC 16,007 (CLRB no. 767)) which began Phase II of these proceedings and whose purpose was simply to determine which persons the Board considered employees within the meaning of the Code. Its purpose was not to determine the bargaining unit, if indeed there was one, to which these employees would belong.

The Board has now come to the stage of Phase II where it is appropriate, in exercising its jurisdiction, to determine the configuration of the bargaining units that remain to be defined in this file.

The headnotes of its decision dated February 10, 1988 (Canada Post Corporation (675), supra), state the following:

"Board decided it was appropriate to reduce to four bargaining units the 26 units which were represented by eight agents - Board decided the following four units were appropriate: 1) the employees currently represented by CPAA should remain in a separate unit as they are separate and distinct from the rest of the operational unit, have historically approached collective bargaining differently and have different needs and desires (Board saw no advantage to either party in including them in a wider unit); 2) an operational unit (collection, transmission, delivery of mail and maintenance of equipment) consisting of those persons currently represented by LCUC, CUPW, IBEW and PSAC; 3) a white-collar administrative unit (administration, technical and professional groups), other than nurses, currently represented by PSAC and PIPS; and 4) a supervisory unit which cuts across all bargaining unit lines and consisting of persons other than first-line supervisors and lead hands."

(emphasis added)

In an initial certification order issued on January 30, 1989, the Board determined a bargaining unit to be represented by the Canadian Union of Postal Workers (CUPW),

merging into a single so-called operational unit the two previously separate units comprising letter carriers and postal workers.

In a second order, the Board maintained intact the unit then represented by the Canadian Postmasters and Assistants Association (CPAA).

The Board must now determine the composition, configuration and content of the final two units, that is, the unit comprising the supervisors and the so-called administrative (white-collar) unit.

After issuing the two decisions dated February 10, 1988 and December 12, 1989, the Board began a long series of public hearings in order to hear the parties. These hearings took place between February 16, 1989 and April 19, 1990, and were accompanied by numerous formal and informal meetings with counsel for the parties, all designed to advance this complex and important file.

On or about April 19, 1990, the Board received a joint request from counsel for the parties: Robert Monette, representing CPC, Jacques Emond, representing the Association of Postal Officials of Canada (APOC), and Andrew Raven, representing the Public Service Alliance of Canada (PSAC). By mutual agreement, counsel asked the Board to suspend the public hearings and allow the parties to try, through negotiation, to reach an agreement on the appropriate so-called supervisory and white-collar units, without prejudice to any of their rights. Given this unanimity, the Board granted this request and suspended the public hearings.

On or about September 10, 1991, the Board received a request

from counsel for PSAC, Andrew Raven, "requesting the Board to take steps to conclude the matter" because, despite repeated and continuous efforts, no general agreement had been reached.

The Board therefore acted to bring the proceedings in this file to a final conclusion. On September 23, 1991, the Board sent a letter to the parties in which it requested written submissions on the appropriateness and relevance of issuing an interim certification order naming PSAC as bargaining agent. Shortly thereafter, the Board received written submissions from counsel for APOC asking the Board to also issue an interim certification order naming it as bargaining agent. It also received lengthy written submissions from CPC strongly objecting to this procedure.

In December 1991, CPC asked the Board to stay its decision because it wished to resume negotiations, which it did.

On May 11, 1992, the Board convened a meeting with counsel for the parties in order to establish a procedure for expediting the file and to find out about the status of the negotiations. The Board also proposed a work plan that relied essentially on written submissions instead of lengthy public hearings, unless such hearings proved essential. Counsel for CPC and for APOC then informed the Board that they had reached an agreement in principle on the configuration and content of a so-called supervisory bargaining unit. All that had to be done was to polish the text of the agreement. The two counsel explained that the agreement had to be finalized by June 1992. The Board notes that this meeting took place on May 11, 1992. Counsel for PSAC, not having received the text of the agreement, expressed to the Board at this meeting serious reservations because he had been informed unofficially that the

classification of "sales representative" might be included in the supervisory unit, and this, in his opinion, would seriously jeopardize the appropriateness of the proposed unit.

The Board then informed the parties that having received and seriously examined the parties' written submissions concerning the relevance and appropriateness of issuing interim certification orders, it was ready to proceed, unless the parties reached a last-minute settlement.

On June 22, 1992, CPC and APOC jointly filed with the Board a 12-page typewritten text entitled "Minutes of settlement" bearing the signatures of the authorized representatives of both parties and the date June 19, 1992.

Subsequently, counsel for PSAC filed with the Board written submissions in which he vigorously objected to the terms of the agreement. He asked the Board to reject the agreement and to implement, without delay, the work plan established at the May 11, 1992 meeting. PSAC argued, among other things, that the "sales representatives" should remain in its unit. The respective counsel for CPC and APOC filed a reply.

Finally, on September 9, 1992, the Board received a petition signed by 58 members of the Union of Postal Communications Employees, Local 00108 (PSAC), informing it "that the undersigned PM's do not wish to have our bargaining unit changed from PSAC/UPCE (Public Service Alliance of Canada) to APOC (Association of Postal Officials of Canada)."

On October 6, 1992, the Board received another petition from approximately 20 French-speaking employees who also challenged the application. Other petitioners came after for a total of approximately 116 persons.

II

The Canada Labour Code gives the Board broad powers and exclusive jurisdiction in determining appropriate bargaining units. The criteria and tests applied in making this determination have repeatedly been examined in great detail in numerous Board decisions. The parties to this proceeding are so familiar with these tests and criteria that it would, in our opinion, be trivial and pointless to repeat them here; furthermore, citing the many decisions on this issue would needlessly lengthen these reasons for decision.

It will therefore suffice for the Board to comment briefly on two aspects of this important issue.

The first aspect relates to the weight, significance and authority of an agreement entered into by the parties, in this case the agreement between CPC and APOC cited earlier.

Past Board decisions are clear and definite in this type of case: the Board in no way considers itself bound by an agreement entered into by the parties concerning the configuration and content of a so-called appropriate unit.

In a long decision dated December 7, 1981 (Bell Canada (1981), 46 di 90; and [1982] 1 Can LRBR 274 (CLRB no. 355)), the Board said the following:

"... The practice of accepting units agreed upon by the union and employer was set aside in favour of the Board's exercise of its wider mandate and responsibility. This was a marked departure from the practice in several provinces where the Board also operates and where our approach is frequently condemned because it differs from the local tripartite board or court approach (see James E. Dorsey, 'The Other Labour Relations Board - 1980' (1980), 38 Advocate 119). To

underline the Board's approach the parties are reminded in each case that, regardless of any agreement they may reach, the Board has sole authority to determine the appropriateness of a bargaining unit. This is done in the Board officer's letter of understanding'...

With this authority the Board, which fashions the unit and does not accept that the parties may negotiate it initially or its modification, must continue to shape the unit as the employer's enterprise changes and be the arbiter of its boundaries. ..."

(pages 113-114; and 291)

A number of other preceding and subsequent decisions have supported, confirmed and consolidated this case law:

"... Section 158 reflects the fact that it is this Board which is the sole body vested with authority to determine matters related to the acquisition or loss of bargaining rights and other matters set out in section 118(p) including the question of the existence of a collective agreement. ..."

(Eastern Provincial Airways (1963) Limited (1978), 30 di 82; and [1978] 2 Can LRBR 572 (partial report) CLRB no. 142), pages 87; and 574)

In another decision, the Board stated:

"However, this merger has not been requested by the applicant union and it claims through its president that the current members have stated their opposition thereto. The Board is sole master in the determination of bargaining units appropriate for collective bargaining."

(Cablevision Nationale Ltée (1979), 35 di 168 (CLRB no. 214), page 187)

The following decisions support the same principles:

Bell Canada (1981), 43 di 86; and [1982] 3 Can LRBR 113 (CLRB no. 300); Cablevision Nationale Ltée (1979), 35 di 168 (CLRB no. 214); Bank of Nova Scotia (Port Dover Branch) (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91); Entreprises Télé-Capitale Ltée, Division CFCM-TV et CKMI-TV (1976), 16 di 230; and 77 CLLC 16,075 (CLRB no. 71); CJRP Radio Provinciale Limitée (1975), 11 di 33; and 77 CLLC 16,074 (CLRB no. 50); National Harbours Board (1980), 41 di 126; and [1980] 3 Can LRBR 265

(CLRB no. 261);

The second aspect pertains to the consideration of the employees' wishes as a criterion to determine an appropriate unit. Here too, past Board decisions are consistent. Although the Board cannot ignore what has already transpired in terms of negotiations, where the employees' wishes are important, this is not a determining factor in defining bargaining units that are appropriate for collective bargaining. This Board panel, moreover, reminded the parties to this proceeding of this in Canada Post Corporation (675), supra, where it said the following:

"... With regard to wishes of employees, we concur with the view of our colleagues as expressed in previous Board decisions that, whereas the wishes of employees are not unimportant, they are not determinative of appropriate bargaining units. (See National Bank of Canada, supra; and Canadian Pacific Limited (1984), 57 di 112; 8 CLRB (NS) 378; and 84 CLLC 16,060 (CLRB no. 482).)"

(pages 93; and 156-157)

The Board even went so far as to state that it is not bound, in determining appropriate units, by a collective agreement between the parties. In an interim decision, the Board ordered:

"1. The Board has very substantial powers in determining bargaining units.

The Board reaffirmed this principle in Tele globe Canada (1979), 32 di 2701 [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198):

'The scope of the studies leading to the recommendations in the Woods Report are well known. These studies enabled the Task Force to elaborate its views on bargaining units and the role which a body like the Board is called upon to play in their determination.

Such determination could be crucial in the dynamics of collective bargaining.

The determination of the bargaining unit is a matter which is given to labour relations boards in Canada in their virtually unfettered discretion. The determination can be a crucial decision to collective bargaining, because the

size and composition of the bargaining unit, the effective constituency of collective bargaining, determine to a significant extent the capacity of the employees for being organized into unions; and hence the likelihood of organization, the potential bargaining power of the union and the point of balance it creates with the power of the employer, and the potential effectiveness of collective bargaining for...' (Canadian Industrial Relations, *supra*, p. 141, No. 447)"

(pages 285; and 99)

Later in this decision, the Board added the following:

"This Board has extensive powers (viz. Sections 118 and 125 of the Code) in this area. The Board's policy is anchored in a continuing concern to only sanction, within the collective bargaining system under its jurisdiction, bargaining units capable of fulfilling as far as possible the preconditions for ensuring that the system functions effectively and produces significant results."

2. The Board is not bound by agreements between the parties concerning the composition of a bargaining unit when an application for certification is filed.

In Telegraph Canada, *supra*, the Board had the following to say regarding this principle:

'Thus, one of the policies of this Board still causes many labour relations practitioners to wince. This Board does not feel bound by an agreement between an applicant union and an employer regarding the content of the proposed bargaining unit. The Board will look very closely at the nature of the enterprise involved. And, among other things, the Board will determine if the proposed unit has not left out, through oversight or otherwise, classifications of employees eminently eligible to be part of the bargaining unit and who would as a result find themselves deprived of any access to collective bargaining should they opt for it.'

(pages 301; and 112)

(Ghislain Otis et al. (1987), 72 di 7; 19 CLRBR (NS) 16; and 88 CLLC 16,004 (CLRBR no. 657)).

More specifically, the Board reiterated these principles in Canadian Broadcasting Corporation (1982), 44 di 19; and 1 CLRBR (NS) 129 (CLRBR no. 383), outlining its policy "of not considering the wishes of the employees it adds to an existing unit when the duties they perform are of similar scope and nature as those included in the unit to which they have been added" (headnotes of the decision) and especially when "in this instance ... those added are fewer in number

than the employees covered by the existing certifications" (pages 167; and 287).

In this case, the evidence shows that the duties in dispute involve the "sales representatives"; PSAC alleges that the latter should remain in its unit. The data and statistics produced by the parties and therefore part of the evidence show that there are 200 "sales representatives". Under its present certificate, APOC represents approximately 3,200 supervisors and superintendents. The 605 new supervisors added under the agreement for a total, in the new unit sought, of approximately 4,100 employees. Therefore, there are approximately 100 salespersons who, according to the written submissions filed with the Board as mentioned above, would object to joining APOC.

Finally, in another decision, the Board stated that where a unit is determined to be appropriate for collective bargaining and the union enjoys majority support, the Board need not take into consideration the wishes of the minority.

"Section 126 sets forth the conditions that must be met before a certification order can be issued. First, an application must have been filed. Second, the Board, as expert on the subject, must determine what is, in its opinion, the unit appropriate for bargaining. Third, if the Board finds that, on the date the application was filed, or any other date the Board considers appropriate, a majority of the employees in the unit that it has already determined to be appropriate for bargaining wish to be represented by the applicant union, it must certify the union. It has no discretion. In practice, it is extremely rare for the unit, that the Board determines to be appropriate to correspond exactly with the one proposed. The Board must certify the union if it has majority status. At this stage, barring any irregularities, the Board does not take the wishes of the minority employees into account. Whether or not they have been canvassed by the applicant union is not important. The certification will oblige them to bargain collectively like all the members of the unit. The Board has no choice, once it establishes that the union has majority status, it must certify the said union. The minority employee who has not been informed of the application does not suffer any legal prejudice. He may, of course, be annoyed because he was not informed. He is in the same situation as the employee whom the union did not canvass before filing its application..."

(B.D.C. Limited (1981), 43 di 140; and [1982] 1 Can LRBR 365 (CLRBR no. 302)). (pages 153; and 376).

Also, the Board expressed the same opinion in Canadian Broadcasting Corporation, supra:

"As a result of the review initiated by the Board, we have determined the units which we consider appropriate for collective bargaining. Before we go on to amend the existing certifications and thereby sanction the jurisdiction of the existing certifications and thereby sanction the jurisdiction of the existing certified bargaining agents, it is reasonable to ask whether there is any need to determine the wishes of the employees involved.

The Board has already dealt with this question, in particular in two decisions, Tele globe Canada, supra, and British Columbia Telephone Company (1979), 38 di 14; [1979] 3 Can LRBR 350. In Tele globe Canada, the Board discussed the monopoly nature of union representation. It emphasized that minorities (49.9% of the employees included in a unit considered appropriate for collective bargaining) could be legally required to be members of a group without the need for canvassing (see, for example, pages 309-325 and 119-133 in this connection). The Board pointed out, inter alia, that on reviews of its orders, and particularly in cases involving the adaptation of existing units to changing realities, it was required to weigh the wishes of the employees added against the need to promote industrial peace, which could be seriously compromised by the non-inclusion of a group of employees in a unit of the same nature. The exclusion of certain employees, even on the grounds that they do not wish to be part of the group to which they have been attached, leads to the development of parallel jurisdictions and jurisdictional disputes, which destabilize the balance of power.

The Board discussed these opposing interests in the following terms:

'Indeed, it is true to say that the subsequent inclusion in a bargaining unit of employees who were not included before, because it had been determined that their affinities and interests were not common with those of the 'certified employees, could constitute a source of tension and that it is better, after having verified the appropriateness of the new unit, to canvass the wish of the added employees prior to adding them to the bargaining unit. But it is just as true to say that tensions will develop if a certified union is not given easy access to adding to the already existing unit any new employee or group of employees whose functions or classifications do not indicate affinities or interests very divergent from those of the employees already in the bargaining unit.

It is true to say that the inclusion in an existing bargaining unit of a large number of employees against the wish of the union and

according to the will of the employer, when one is dealing with employees having the same community of interests, could entail the loss of the representation rights by the bargaining agent. But it is equally true to say, in such circumstances, that a contrary determination would favour the proliferation of bargaining units if these new employees opt to bargain collectively or else could culminate in a negotiation amounting to nil if the certified union enters into a collective agreement which applies to only a fraction of the employees who should rationally be covered by it. Because then, an employer could 'fish in troubled waters' without fear of legal recourse, by favouring the 'non-certified' employees. Because then, in case of a strike by the certified union, production could go on with the non-unionized and the lack of balance between the parties thereby fostered, could cause the eventual demise of that certified union.

It is true to say that one must, in general, avoid giving the impression to the public that the collective bargaining regime is not equitable and just by including in a unit employees who did not belong to it without consulting them and that this could create hostility among those employees towards collective bargaining and could create the impression that the regime instituted by the Code was drafted or is applied to favour the union as an institution and not in favour of employees. But it is just as true to say that the Code was drafted on the basis of the exclusive monopoly of representation of bargaining agents, with the determination of the state to elevate certified unions precisely to the level of institutions with a very demanding role to play in our society...'

pages 324 and 132

The Board later continued its reflections in British Columbia Telephone Co., supra. The Board asserted on pages 79-80 and 398-399, that when the question involved was not one of representation but related to the interpretation and determination of the units, the employees' wishes were immaterial. This is true, in particular, when positions are created by the employer and are not attached to the unit with which they are associated in scope or nature. The Board reached a similar conclusion in B.D.C. Limited, supra, and Sunwapta Broadcasting Limited (1981) 43 di 218.

As regards the CUPE (OPG) unit, the addition of functions identical to those of announcer is entirely consistent with the nature of the existing unit.

As in B.C. Telephone, supra, the question in this case concerns the determination of appropriate units. This question is not one of representation. If the Board rules that it is appropriate to include a given function in an existing group and the bargaining agent has already been shown to be representative, there is no need to review the status of the certified union. In due time, as provided by the Code, the employees can review the question by changing the bargaining agent or

asking for its removal. Any other reasoning would imply that a union which loses its majority position during the term of a collective agreement loses its status. The Code provides that this status can be reviewed only within very specified time limits. The appropriate unit will remain homogeneous, however, no matter what becomes of the bargaining agent. If the Board were required to reconsider the status of an already certified bargaining agent, when it considers that it is appropriate, for collective bargaining purposes, to attach another group to the existing group, it would be abdicating its responsibility to determine appropriate units as provided in section 125 by subordinating the appropriateness of the unit to the wishes of the employees. The employees added to the existing unit are automatically covered by the existing collective agreement to the extent that it is applicable to them. Specific conditions can be negotiated, just as it is possible to renegotiate certain provisions during the life of a collective agreement. Their power is limited, however, since they cannot make use of the strike weapon until the entire group has acquired that right. Precedence goes to the collective agreement and to the industrial stability which it makes possible (Premier Cablesystem, supra).

In this instance, in each case, those added are fewer in number than the employees covered by the existing certifications.'

(pages 165; and 285; emphasis added)

It must also be clearly understood that it would in some cases be inappropriate and very difficult for the Board to exercise its jurisdiction, and the Board might even be tempted to abdicate its responsibilities, were it to adopt as an absolute and determining criterion agreements entered into by the parties and the employees' wishes.

In dealing with this case, the Board has already noted that the application for review that gave rise to this interim decision was filed with the Board on May 6, 1985. At numerous public hearings that were held, in particular during 1986, each of the bargaining agents presented proposals concerning the restructuring of the bargaining units.

The Board reproduced these proposals. Among them was one made by CPC at the outset, namely, that there be five bargaining units. According to CPC, the fifth unit would be

defined as follows:

"A sales and customer service unit."

(Canada Post Corporation (675), supra, pages 76; and 139)

Moreover, in a letter dated May 9, 1986, Andrew Raven, counsel for PSAC, described as follows the administrative and office unit contemplated at that time:

"All employees of Canada Post Corporation whose work involves the operation of office equipment, the processing or implementation of procedures or decisions, the administrators... (not engaged in plant machinery or facility maintenance), and sales and customer service employees. ...

Engineering and Scientific Support (EG-ESS)
Engineering and Land Survey (EN)
Information Services (IS)
Nursing (NU)
Administrative Services (AS)
Programme Administration (PM)
Computer Systems Administration (CS)
Financial Administration (FI)
Drafting Illustration (DD)
Library Science (LS)
General Technical (GT)
Social Science Support (SI)
Purchasing and Supply (PG)
Clerical and Regulatory (CR)
Office Equipment (OE)
Secretarial, Stenographic and Typing (SS&T)
Data Processing (DA)
Communications (CM)
General Services (GS), Security Guards only."

(emphasis added)

Counsel for APOC, for his part, in a letter dated May 9, 1986, defined the supervisory unit as follows:

"All employees of the Canada Post Corporation employed in a supervisory or administrative capacity in the operation and administration of collection, processing, transportation, transmission and delivery of mail and programmes related thereto, the maintenance of related equipment and facilities, the provision of Postal Store services and the provision of Postal Counter services including customer services, excluding those involved in sales and marketing."

(emphasis added)

If the Board had to adhere strictly to the sometimes

contradictory and changing submissions of the parties, it would be virtually paralysed in exercising its exclusive jurisdiction. It would be forced to decline jurisdiction.

III

Having said this, the Board comes now to the conclusions of these reasons.

The Board conducted these lengthy proceedings through a series of public hearings or a number of formal and informal meetings with the parties. It asked the parties to file numerous written submissions.

The time has now come to decide the matter.

Although the Board does not feel in any way bound by the document entitled "Minutes of settlement" concluded between CPC and APOC on or about June 12, 1992 (as we described it earlier), it cannot flatly dismiss and ignore the parties' remarkable and commendable efforts to reconcile their differences and thus dismiss this initiative out of hand.

The Board has always encouraged the parties to sit down at the same time and try to reach an agreement.

Moreover, even though the unit described in this agreement may not constitute the most appropriate unit, past Board decisions have established that the Board is not required to determine the ideal unit.

"All labour boards in Canada have more or less abundantly written about the criteria to be applied in determining the appropriateness of a bargaining unit; certainly this Board has done so."

This Board established the extreme limits of its discretion in this area in a fairly formal manner:

1. It is not required to determine the ideal unit.
2. There may be more than one appropriate unit, successively over time or at the same time.
3. It is not bound by any earlier finding, and it may change any such determination.

It will not always be possible to determine the most appropriate unit, for a whole host of reasons, the most important of which is undoubtedly that to do so would be to deprive a group of employees of their freedom to join the organization of their choice (section 110 of the Code).

Generally speaking, ideal units, for reasons that have already been set out in a long line of cases, are those units that group the most employees possible."

(National Bank of Canada (1985), 58 di 94; 12 CLRBR (NS) 257; and 86 CLLC 16,032 (partial report) (CLRBR no. 542)), pages 139; 299-300 and 14,312)

One of the deciding factors the Board must consider in determining the appropriate unit pertains to the community of interest criterion.

On this particular subject, this Board panel advised the same parties in the following terms in Canada Post Corporation 675, supra:

"With regard to the criterion of community of interest, we would like to make the point that, in an ideal situation, the Board might be able to configure bargaining units on the basis of community of interest only. Unfortunately, that is not always possible. That objective, or need, or desire, is more or less easily attained depending on the nature and the size of the employer. In our view, the larger the employer, the less important that particular criterion becomes. Thus, whereas it is an important criterion that cannot be ignored and must be examined, the traditional concept of community of interest must be looked at in the context of the other criteria and they together must be examined in the light of the objectives the Board has set out for the instant case."

(page 94)

The parties' written submissions have satisfied the Board

that the "sales representatives", in view of their specific working conditions (irregular, undetermined or split work schedule, etc.) rate of pay resemble more supervisors than regular clerical employees, data processing clerks, library clerks, administrative employees, and all other classifications covered by PSAC's current certificate.

Finally, the parties to the above-mentioned agreement signed on June 12, 1992, agreed that the majority of the "sales representatives" perform genuine supervisory work (supervision of personnel and processes, jointly or alternatively), corresponding to the basic criteria outlined by this Board in Canada Post Corporation (675). supra.

Finally, in Claude Latrémouille v. Canada Labour Relations Board et al., file nos. A-445-82, A-467-82 and A-725-82, January 22, 1985, the Federal Court, in reviewing the Board's decision in Canadian Broadcasting Corporation, supra, did not question the community of interest criterion used to determine if a given unit is appropriate. However, the Court confirmed that the Board has the authority to decide not to hold a vote in order to ascertain the wishes of the employees since the added employees constituted a minority (see Pratte, J., page 15).

In Nova Scotia Nurses Union v. CLRB and Cape Breton Development Corporation [1990] 3 C.F. 652, Judge MacGuigan said:


" As I read the CLRB decision, it did not purport to find a separate bargaining unit inappropriate solely because of numbers, and certainly not because of "mere numbers". It seems to me that the Board saw the numbers (12 in 3,400) as so disproportionate as to be a qualitative rather than just a quantitative difference. In addition, the Board also thought it relevant that the twelve nurses were scattered throughout five locations, with no more than three at any location. To my mind, moreover, even a decision in terms of mere numbers would not be an error in

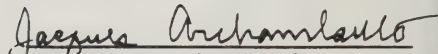
law, because there is no statutory requirement that the factors considered under subsection 125(3) should be different from those taken into account under subsection 125(1). Both are left to the discretion of the Board. Finally, even if the Board had committed an error in law, such an error would appear to be within the Board's expertise. It would be a "mere" error of law, not a "patently unreasonable" one that would be subject to judicial review: *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412." (page 661)

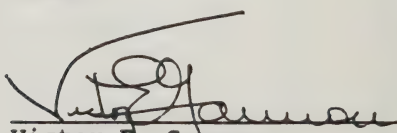
Providing the Board is convinced that a unit respects the corporate structure and the employees' community of interests, that it is viable, that it guarantees industrial peace, the Board must declare itself satisfied. That is the case here. The Board will therefore issue a certification order that will be worded as follows:

"All supervisory employees of CPC below organizational level I, involved in mail operations, mail operations support and quality control, including superintendents of postal stations and letter carrier depots, sales representatives and those involved in supervision of admail and revenue protection, excluding personnel involved in network planning, control center activities, customer services representatives, retail representatives, superintendents of grade offices and persons employed in a confidential capacity in matters relating to labour relations."

This is a unanimous decision of the Board.


M. Brian Keller
Chairman of the Panel


Jacques Archambault
Member


Victor E. Gannon
Member

ISSUED at Ottawa, on this 15th day of February 1993

information

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Summary

Public Service Alliance of Canada, complainant, and Royal Canadian Mint, respondent.

Board Files: 745-4064
745-4073

Decision No.: 994

The Board is dealing with two complaints alleging violation of section 94(3)(c) of the Canada Labour Code (Part I - Industrial Relations) by the Royal Canadian Mint.

During rotating strike action by the employees in the bargaining unit, some bargaining unit employees not then striking were asked to perform the duties of some of the striking employees. They refused and were sent home.

The complainant alleges that the refusing employees were suspended or otherwise penalized by reason of such refusal.

By section 98(4) of the Code, the onus is on the respondent to prove that it did not violate the Code.

The Board finds that in the circumstances of the case the actions of the respondent in sending the refusing employees home amounted to a rotating lockout and did not constitute a suspension or other form of discipline of the employees.

Ce document n'est pas officiel. Seuls les Motifs de décision peuvent être utilisés à des fins juridiques.

Résumé

Alliance de la Fonction publique du Canada, plaignante, et Monnaie royale canadienne, intimée.

Dossiers du Conseil: 745-4064
745-4073

Décision n° 994

Le Conseil doit trancher deux plaintes alléguant violation de l'alinéa 94(3)c) du Code canadien du travail (Partie I - Relations du travail) par la Monnaie royale canadienne.

Pendant des grèves tournantes mettant en cause les employés de l'unité de négociation, certains employés de l'unité qui ne faisaient pas la grève ont été priés d'effectuer les tâches de certains employés en grève. Par suite de leur refus, ils ont été renvoyés chez eux.

La plaignante allègue que les employés qui ont refusé de travailler ont été suspendus ou pénalisés en raison de ce refus.

En vertu du paragraphe 98(4) du Code, il incombe à l'intimé de prouver qu'il n'a pas violé le Code.

Le Conseil juge que, dans les circonstances de la présente affaire, les mesures prises par l'intimée équivalaient à des lock-out tournants et ne constituaient pas une suspension ou autre forme de mesure disciplinaire imposée aux employés.

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LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW

Reasons for decision

Public Service Alliance
of Canada,

complainant,

and

Royal Canadian Mint,

respondent.

Board Files: 745-4064
745-4073

The Board was composed of Mr. J. Philippe Morneau, Vice-Chairman, and Ms. Evelyn Bourassa and Mr. Michael Eayrs, Members.

Appearances

Mr. Allan H. Turnbull, accompanied by Mr. Robert Bayne, and Mr. J.-P. Tremblay, Director of Labour Relations and Compensation, for the respondent; and

Mr. James G. Cameron, accompanied by Mr. Jacques Gaboury, for the complainant.

These reasons for decision were written by Mr. J. Philippe Morneau, Vice-Chairman.

I

The Board must dispose of two complaints of alleged unfair labour practices contrary to section 94(3)(c) of the Canada Labour Code (Part I - Industrial Relations).

The first complaint (file 745-4064), filed with the Board on October 29, 1991 by the Public Service Alliance of Canada (the union or the complainant), alleges that the Royal Canadian Mint (the employer or the respondent) violated section 94(3)(c) by suspending John Glennie and Geraldine Schultz, two employees of its Precious Metals Section, after they refused to perform the work of striking employees in its Numismatic Orders Processing Section.

The second complaint (file 745-4073), filed with the Board on November 6, 1991 by the union, alleges that the employer violated section 94(3)(c) by suspending a number of its machinists at its Ottawa plant. This complaint was amended three times, namely on November 7, 12, and 13, 1991, each time to add names to the list of employees who, according to the union, were suspended.

Both complaints were heard together in Ottawa on January 28 and 29, 1992.

II

The facts that the Board finds material to these complaints are fairly simple and are as follows.

The employer is a Crown corporation and is in the business of minting coins. It has operations at Ottawa and Winnipeg which employ approximately 500 employees, who are members of a single bargaining unit represented by the union.

The union and employer were in a so-called "free position" as of September 28, 1991, that is, the union was in a legal strike position and the employer was in a legal position to

lock out employees.

On October 24, 1991, the Winnipeg operation was struck by the union. That location remained on strike during all times material to this complaint.

While the Winnipeg operation was struck, the Ottawa operation was still operating.

On October 28, 1991, 22 bargaining unit members withdrew their services from the Numismatic Orders Processing Section (NOP) in Ottawa. The union was conducting what is commonly called rotating strike action.

On that day, the employer decided to reassign two bargaining unit employees of its Precious Metals Section (PM) in Ottawa, who were not then striking, to do NOP work. Jean-Pierre Tremblay, Director of Labour Operations and Compensation for the employer, called in John Glennie and Geraldine Schultz, both PM employees, and told them that they would have to do NOP work. Both refused saying they did not want to do the work of striking employees. Both were then told by Mr. Tremblay that the employer had decided there was no other work available for them and that they would have to go home. They were also told they could return to work when the NOP employees returned to work.

The NOP employees returned to work on November 5, 1991, and Mr. Glennie and Ms. Schultz came in that day. However, they had assignment problems and both of them only returned to work on November 7, 1991. On November 14, 1991 they were laid off along with the rest of the employees.

In the minting operations carried on in Ottawa and Winnipeg, the employer employs machinists, part of whose job is to make collars which are used in the minting of coins. The machinists' job description is standard and is the same in Ottawa and Winnipeg. In general operations, Winnipeg makes circulation coins and Ottawa makes numismatic coins. Usually the corresponding collars are made by the machinists at the appropriate location.

On November 5, 1991, all machinists working at Ottawa that day were individually asked by the machine-shop foreman, Michel Mongeon, to make "Fiji" collars. It is an incontrovertible fact that, in the normal course, this work would be performed by machinists in Winnipeg. Being aware of the provisions of section 94(3)(c) of the Code like all their union brethren in Ottawa, they refused to do the "Winnipeg" work and all were sent home. They were told by Mr. Mongeon that there was no other work available and that they were suspended. These employees were: Yvon Brosseau, Juan Pascuet, Jean Bérubé, Alan Louis-Seize, Irlan Burke, Roger Chartrand and Jacques Lafond.

On November 6, 1991, machinist Daniel Gareau, upon his return to work (he was not at work on November 5) was also asked by Mr. Mongeon to make Fiji collars. He refused and was sent home. The same thing happened to Lee Hamilton on November 7, 1991, and to Gordon Zappa on November 12, 1991 which would have been his first work day after his annual leave.

None of the machinists except those who were sent home on November 5, 1991 were expressly told by Mr. Mongeon that they were suspended. The regular discipline procedure in

place was not used with respect to any of the above machinists or PM employees.

III

The employer submits that the issue the Board must consider is one of discipline. It submits that none of the actions of the employer were discipline of the affected employees and therefore there is no violation of section 94(3)(c). The employer claims that the employer's actions amount to a lockout.

Alternatively, the employer submits that the employees in question went on strike because they refused in concert to work.

Furthermore, the employer argues that section 94(3)(c) has no application because the legislator could not have intended it to protect the striking bargaining unit employees.

As for the union, it submits that the employees in question were suspended and were punished for having refused to do struck work. It submits that it is not sensible to say they were not suspended simply because the regular disciplinary procedure was not followed.

IV

Section 94(3)(c) of the Code states:

"94.(3) No employer or person acting on behalf of an employer shall

...

(c) suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of his refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike or subject to a lockout that is not prohibited by this Part."

Pursuant to section 98(4) of the Code,

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party"

the burden of proof is on the employer to establish that its actions were not contrary to the Code.

Legislative provisions like section 94(3)(c) of the Code are rare. At the provincial level, they exist in only three jurisdictions, namely in Manitoba (Labour Relations Act, C.C.S.M. 1987, C. L-10, section 16), in Nova Scotia (Trade Union Act, R.S.N.S. 1989, c. 475, section 53(3)(c)), and in Alberta (Labour Relations Code, S.A. 1988, c. L-12, section 147(f)).

Decided cases are very few. Other than the Board's cases, the provision has only been considered once in Nova Scotia in Sydney Police, [1977] 1 Can LRBR 481, where it was found

the employer had not contravened the section by suspending its police officers for refusing "to do police duty." The decision was predicated in that case on the conclusion that the police officers' jobs were qualitatively different from the struck work.

The Board issued decisions on complaints of violation of section 94(3)(c) of the Code in four cases: British Columbia Telephone Company (1979), 37 di 20; [1979] 2 Can LRBR 297; and 80 CLLC 16,007 (CLRB no. 187); British Columbia Telephone Company (1979), 38 di 124; [1980] 1 Can LRBR 340; and 80 CLLC 16,008 (CLRB no. 220); British Columbia Telephone Company (1981), 47 di 28; [1982] 1 Can LRBR 326; and 82 CLLC 16,149 (CLRB no. 358); and Canada Post Corporation (1987), 71 di 177 (CLRB no. 652). In none of the above cases did the Board ever deal with a situation where the complainants were actually members of the striking bargaining unit. What is clear from the thrust of the decisions, however, is that section 94(3)(c) is meant as a protection for employees from some sort of discipline imposed by the employer.

In Canada Post Corporation (1992), as yet unreported CLRB decision no. 930, the Board found that there was no "discipline" involved in preventing employees from returning to work during a strike and that this constituted a rotating lockout notwithstanding the fact that the said employees had been specifically told they were not being "locked out."

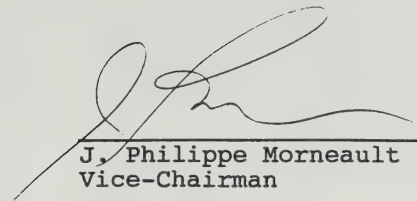
In the instant case, the employer has asked us to find that what occurred was in fact a strike by the employees who in concert refused to do work assigned by the employer. In British Columbia Telephone Company (1980), 40 di 163;

[1980] 3 Can LRBR 31; and 80 CLLC 16,062 (CLRB no. 253), the Board held that if employees refuse in concert to perform protected work, whether at the urging of the union or not, it would not be a strike as defined by the Code although it would be a refusal to work. It is therefore clear that, in this case, there can be no finding of strike by the employees in question.

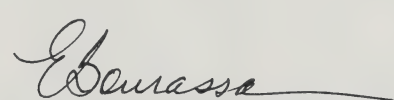
The employer has also asked us to find that section 94(3)(c) affords no protection to the employees of the striking bargaining unit, the employees who are involved in the so-called economic struggle. We do not interpret section 94(3)(c) in such a narrow sense. As we have stated previously, it is meant as protection to "employees" from some sort of discipline. In cases where the affected employees are members of the striking bargaining unit, the Board will really look closely at the substance of the actions complained of rather than simply at their form to make the required decision with regard to those actions.

What we are really concerned with in this case is the determination of whether the employer's actions constituted "discipline" of these employees. After carefully examining the evidence, we cannot conclude that the employees affected here were disciplined notwithstanding the poor choice of words of Mr. Mongeon on November 5, 1991. No disciplinary procedure was at any time invoked by the employer with respect to these employees; they were simply sent home and prevented from returning to work until certain events occurred. As in Canada Post Corporation, supra, we must conclude that these employees were selectively locked out by the employer.

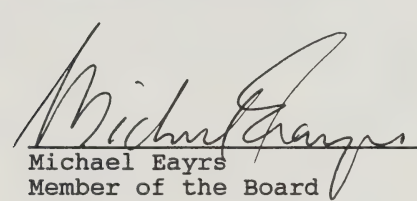
Having found that the employer did not violate section 94(3)(c) of the Code, these complaints are dismissed.



J. Philippe Morneault
Vice-Chairman



Evelyn Bourassa
Member of the Board



Michael Eayrs
Member of the Board

ISSUED at Ottawa, this 19th day of February 1993.

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Summary

WESTERN CANADA COUNCIL OF TEAMSTERS,
TEAMSTERS LOCAL UNIONS 362, 31 AND
213, APPLICANTS, BTS BYERS
TRANSPORTATION SYSTEMS INC.; BYERS
TRANSPORT LTD.; SPRUCELAND CARTAGE
LTD.; PRINCE GEORGE WAREHOUSING CO.
LTD.; NORTHERN INTERIOR TRANSPORT
LTD.; NORTHERN INTERIOR FASTFRATE
LTD.; MONARCH TRANSPORT (1975) LTD.;
MACLEAN CONTRACTING LTD. AND DEMPSEY
CONTRACTING LTD., EMPLOYERS, AND
CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS,
INTERVENOR.

Board Files: 530-2096
560-284
580-132
585-473

Decision No. 995

These reasons deal with a complex set
of applications under various
provisions of the Canada Labour Code
(Part I - Industrial Relations)
including sale of business (sections
44, 45 and 46), single employer
declaration (section 35), review and
variation of the scope of existing
bargaining units (section 18), and
trade union successor rights (section
43). In these applications, the
Teamsters asked the Board to declare
all of the named companies to be a
single employer and a single
undertaking for the purposes of Part
I of the Code. They also asked the
Board to determine that a single
bargaining unit is appropriate for
collective bargaining and to name the
Council as the bargaining agent.

The applications were dismissed.
In its reasons the Board revisits the
established criteria applicable to
applications of this nature.
Notwithstanding that the named
companies are clearly associated or
related and under common control and
direction, the Board declined to
exercise its discretion under section
35 of the Code to declare them to be

Résumé de Décision

WESTERN CANADA COUNCIL OF TEAMSTERS,
SECTIONS LOCALES 362, 31 et 213 DU
SYNDICAT DES TEAMSTERS, REQUÉRANTS,
BTS BYERS TRANSPORTATION SYSTEMS
INC., BYERS TRANSPORT LTD.,
SPRUCELAND CARTAGE LTD., PRINCE
GEORGE WAREHOUSING CO. LTD., NORTHERN
INTERIOR TRANSPORT LTD., NORTHERN
INTERIOR FASTFRATE LTD., MONARCH
TRANSPORT (1975) LTD., MACLEAN
CONTRACTING LTD. ET DEMPSEY
CONTRACTING LTD., EMPLOYEURS, ET
FRATERNITÉ CANADIENNE DES CHEMINOTS,
EMPLOYÉS DES TRANSPORTS ET AUTRES
OUVRIERS, INTERVENANTE.

Dossiers du Conseil: 530-2096
560-284
580-132
585-473

Décision n° 995

Les présents motifs traitent d'une
série complexe de demandes présentées
en vertu de nombreuses dispositions
du Code canadien du travail (Partie I
- Relations du travail), notamment
celles portant sur les ventes
d'entreprises (articles 44, 45 et
46), sur les déclarations d'employeur
unique (article 35), sur la révision
et la modification de la portée des
unités de négociation existantes
(article 18) et sur les droits
successoraux du syndicat (article
43). Dans ces demandes, les
Teamsters demandent au Conseil de
déclarer que toutes les compagnies
nommément désignées sont un employeur
unique et une entreprise unique aux
fins de la Partie I du Code. Ils
demandent également au Conseil de
déterminer qu'une seule unité est
habile à négocier collectivement et
de désigner le Council à titre
d'agent négociateur.

Les demandes sont rejetées. Dans ses
motifs, le Conseil repartle des
critères établis qui s'appliquent aux
demandes de ce genre. Même si les
compagnies nommément désignées sont
des entreprises nettement associées
ou connexes et que leur direction ou
contrôle est assumé en commun, le
Conseil refuse d'exercer son pouvoir
discrétionnaire aux termes de

a single employer and a single undertaking in the absence of compelling labour relations reasons for so doing. The Board also found the underlying reasons for the applications to be a circuitous attempt by the Teamsters to take over bargaining rights held by the CBRT & GW which goes well beyond the purposes of section 35 of the Code.

Doubts were also raised by the Board about the transferability of the bargaining rights from the Teamster Local Unions to the Council via sections 18 and 43 of the Code in the given circumstances. This aspect of the applications was not determined, however, in light of the decision to dismiss the section 35 application.

l'article 35 du Code et de les déclarer employeur unique et entreprise unique parce qu'il n'y a pas de bonnes raisons du point de vue des relations du travail pour le faire. En outre, le Conseil juge que les présentes demandes constituent un moyen détourné pour les Teamsters de s'accaparer des droits de négociation détenus par la Fraternité, ce qui va bien au-delà de l'application de l'article 35 du Code.

Le Conseil a formulé des doutes quant au transfert des droits de négociation des sections locales des Teamsters au Council en passant par les articles 18 et 43 du Code dans les présentes circonstances. Toutefois, cet aspect des demandes n'a pas été décidé en tenant compte de la décision de rejeter la demande fondée sur l'article 35.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Western Canada Council of
Teamsters;
General Teamsters, Local
Union No. 362;
General Truck Drivers and
Helpers, Local Union No. 31;
and
Teamsters Local Union No.
213,

applicants,

and

BTS Byers Transportation
Systems Inc.;
Byers Transport Limited.;
Spruceland Cartage Ltd.;
Prince George Warehousing
Co. Ltd.;
Northern Interior Transport
Ltd.;
Northern Interior Fastfrate
Ltd.;
Monarch Transport (1975)
Ltd.;
MacLean Contracting Ltd.;
and
Dempsey Contracting Ltd.,

employers,

and

Canadian Brotherhood of
Railway, Transport and
General Workers,

intervenor.

Board Files: 530-2096
560-284
580-132
585-473

The Board was composed of Mr. Hugh R. Jamieson, Vice-Chair, and Messrs. Calvin B. Davis and Michael Eayrs, Members.

Appearances:

Mr. Edgar B. Norman and Ms. Lucille Whyte for the
applicants;

Mr. Michael W. Hunter for the employers; and

Messrs. Peter Askin and Harry Moon for the intervenor.

The reasons for this decision were written by Vice-Chair Hugh R. Jamieson.

I

These reasons deal with a number of applications under various provisions of the Canada Labour Code (Part I - Industrial Relations) including sale of business (sections 44, 45, and 46), single employer declaration (section 35), review and variation of the scope of existing bargaining units (section 18) and trade union successor rights (section 43).

The main thrust of the applications which were filed with the Board on June 25, 1992 is to reconsider the scope of the existing bargaining units presently represented by the three applicant Teamster Local Unions Nos. 362, 31 and 213 (the Local Unions or the Teamsters) at Spruceland Cartage Ltd. (SCL) and Byers Transport Limited (BTL) and to merge them into a single bargaining unit. The applications also seek to expand the bargaining rights of the Local Unions to include the employees of Northern Interior Transport (NIT) who are presently represented by the Canadian Brotherhood of Railway, Transport and General Workers (CBRT&GW). The Teamsters also want to include the employees of MacLean Contracting Ltd., and/or Dempsey Contracting Ltd. (MCL/DCL) in the proposed single bargaining unit along with the employees of all the other companies. The employees of MCL/DCL are not represented by any trade union. Further, the Local Unions want the bargaining rights for the proposed single bargaining unit transferred to the Western Canada Council of Teamsters (the Council).

It is also alleged in the applications that BTS Byers Transportation Systems Inc. (BTS) or one of the other employers named in the applications, purchased BTL within the meaning of the Code and the Teamsters seek remedial orders as may be necessary to determine the appropriate bargaining unit and the applicable binding collective agreement.

Finally, the Teamsters also allege that BTS, as the successor employer to BTL, has violated a 1989 order of the Board which required BTL to hire certain named members of the Teamsters should it or any of its subsidiaries or related companies open a terminal in the lower mainland of British Columbia within a period of two years from the date of the order. The remedy sought here is a declaration and an order under section 21 of the Code to rectify this alleged violation, including damages.

A public hearing was conducted into these applications at Vancouver on December 15, 16, 17 & 18, 1992.

II

There is no dispute that all of the named employers in these applications are related and that they are under common control and direction. They are all owned and operated by what was referred to as the "Assman family". Mr. Herbert J. Assman is the President and his son, Mr. John K. Assman the Executive Vice-President and Chief Operating Officer of BTS which is a holding company that owns 100% of PGW and BTL which in turn, are divisions of BTS.

The PGW division includes SCL, MCL/DCL and NIT, as well as a company known as Spruceland Terminals whose employees are represented by the Brewery Workers Union Local 300; and Spruceland Truck & Repair Service Ltd., whose employees are non-union. The latter two companies are not affected by these applications.

The BTL division includes BTL and Monarch Transport (1975) Ltd., which is an inactive company. (As far as we can make out, Monarch's main function of hauling between Alberta and the Northwest Territories is now done under the name of Monarch as a division of BTL).

At the hearing, the Board heard much about the history and how BTS has developed over the years since 1958 from a single company at Prince George that was involved in the beer distribution business to the massive interprovincial and international transportation network that it is today. While this overview was indeed informative and helpful in that it put these applications into their proper perspective, we need not relate to all of that history for our purposes here. It will suffice to give a brief sketch of the role of each of the companies affected in the integrated transportation system that presently operates under the BTS flag and to show how and when they became part of the network. We shall also highlight the bargaining rights held by the Teamsters Locals and by the CBRT & GW.

BTS as indicated, is a holding company operating out of #1170 - 1040 West Georgia Street, Vancouver. BTS provides financial, operational and marketing support to the other named companies for which it charges a management fee.

PGW is a management company responsible for managing transport operations and warehouse facilities involved in the movement and storage of general freight. PGW operates from 1633 First Avenue, Prince George, B.C. and it has interline agreements with BTL, MCL/DCL and SCL. NIT is PGW's agent in Vancouver. PGW has operating authorities in both B.C. and Alberta.

SCL operates a general freight facility at 1633 First Avenue, Prince George. It carries on a line-haul, local pick-up and delivery business which includes a warehouse and office. This is primarily a cross-dock operation for movement of freight to and from Prince George, Northern B.C. and Alberta. SCL has a trailer exchange operation with MCL/DCL at the Alberta border. SCL has no running authorities, it operates on the running rights of PGW.

NIT operates a transportation and warehouse facility out of 1108 Derwent Way, Annacis Business Park, New Westminster, B.C. It does local pick-up and delivery in the Vancouver area and line hauls from Vancouver to Edmonton. NIT also carries freight from Vancouver to 70 Mile House where there is an exchange with SCL drivers. Where there is no such switch, NIT drivers take the loads to the SCL terminal at Prince George. NIT has no running rights of its own; it operates under the authorities held by PGW.

BTL is an L.T.L. (less than full load) general freight carrier that provides daily service to and from the Yukon and Northwest Territories. Its main business is the collection of freight in Calgary, Edmonton and Vancouver for sorting and distribution to various points in the above regions. Freight from those

regions is brought back to the hubs at Calgary, Edmonton and Vancouver to be distributed throughout B.C., Alberta, as well as to Eastern Canada and the U.S. BTL has some thirty-four offices throughout B.C., Alberta and the Territories, twenty of which are company-owned. The others are operated by agents. The current principal address of BTL is 2840 - 76 Avenue, P.O. Box 157, Edmonton, Alberta. As we noted earlier there is a division of BTL operating under the name of Monarch.

MCL/DCL are really two companies operating as a single trucking undertaking working out of #17 - 12232 - 156 Street N.W., Edmonton, Alberta. DCL is the operating name in Alberta and MCL moves freight in B.C. for PGW.

The only other company named in the applications to which we have not referred is Northern Interior Fastfrate Ltd. (NIF). NIF is inactive. It previously operated as a trade name under PGW.

III

To pull all of that together, we have to go back to 1974 when PGW began expanding beyond the beer distribution business and out of Prince George. PGW became a holding company at that time and a new entity, Prince George Warehousing (1974) Ltd. (PGW(1974)) was incorporated to take over local pick-up and delivery in Prince George. A new warehouse was built and the new company voluntarily recognized Teamsters Local 31 to represent its employees. (The Brewery Workers Union continued to represent employees

in the beer distribution end of the business under Spruceland Terminals and still does today).

In 1979, NIF was incorporated to be used as a marketing logo. At that time, LTL freight business was being solicited in Vancouver through an agent, Leader Terminals. Also, in 1979, a lease operator by the name of John MacLean brought his operation MCL into the network working under the NIF logo. In 1985, PGW bought MCL from John MacLean who moved to Edmonton as Terminal Manager of the newly established DCL. (The DCL name came about because the name MacLean Contracting Ltd., was already registered by someone else in Alberta. Dempsey is John MacLean's middle name, hence the name Dempsey Contracting Ltd.). It was in 1985 that DCL began operating as a non-union warehouse, local pick-up and delivery in Edmonton with a line haul to just inside the Alberta/B.C. border where there was a trailer exchange point with PGW (1974) for freight bound to and from Prince George.

In January 1989 NIT was incorporated in Alberta. This came after a decision by the Assmans to enter the F.T.L. freight business (full truck load) and to attempt to penetrate the Edmonton market. NIT operated with a few lease operators primarily between Edmonton and Calgary. Rather than go with the Teamsters though, NIT voluntarily recognized the CBRT & GW to represent its lease operators. According to the testimony of Mr. John Assman, this decision was made because the CBRT & GW agreement was less expensive and much more flexible vis-à-vis the use of lease operators. Clearly, NIT went with the CBRT & GW to avoid the Teamsters collective agreement.

In July 1989, NIT moved its head office to Vancouver and established its first terminal at 669C Derwent Way. NIT hired its first hourly paid warehouse employees at that time and the CBRT & GW collective agreement was amended accordingly to extend the voluntary recognition to cover these employees at Vancouver. It should also be noted that the PGW pick-up and delivery agent at Vancouver was then Advance Carriers Ltd., (Advance).

In December 1989, PGW (1974) became SCL. This was really only a corporate name change and the Teamsters Local 31 bargaining rights continued as they were.

In March, 1990, a new holding company was formed for the PGW group of companies. Hajah Inc. (Hajah) took over. This name derives from Herbert and John Assman Holdings.

On June 27, 1990, Hajah bought BTL from the Laidlaw conglomerate. BTL employees were represented by the Local Unions. (Locals 31 and 362 had been certified as bargaining agent by this Board and Local 213 had been voluntarily recognized by BTL). It should also be noted that BTL's agent at Vancouver at that time was Owl Express (Owl) which was non-union.

In October 1990, the running rights of PGW and BTL in B.C. were amended to allow for cross-over rights. That meant that either company could carry freight on each other's running authorities.

On January 11, 1991, Hajah purchased a large new terminal at 1108 Derwent Way which became the NIT terminal. NIT then became the Vancouver agent for NIF's Prince George business as well as BCL's Okanagan/Kootenays business in place of Advance and Owl.

To complete the corporate picture, BTS was formed and replaced Hajah as the holding company in May 1991.

Against that factual background the Teamsters (meaning from here on the Local Unions and the Council, except where specified) argued that the corporate relationship and control as well as the operational integration and functional interdependence between the BTS group of companies should lead the Board to conclude that they all really constitute a single transportation undertaking. The Teamsters urged the Board to use its powers under section 18 and 35 of the Code to declare the named companies to be a single federal work, undertaking or business, to vary the bargaining unit structures to create one single bargaining unit and to name the Council as the exclusive bargaining agent for this unit.

In this regard, the Teamsters claim a majority of the employees in the single proposed bargaining unit as members and urged the Board to certify the Council as the bargaining agent without further ado. However, as an alternative, the Teamsters said that they would not seriously object if the Board decided to conduct a representation vote to allow the affected employees to choose between the Council and the CBRT & GW.

IV

There is little to be decided under the sale of business aspect of these applications and we therefore need not even reproduce the relevant sections of the Code. It never has been in dispute that BTL was purchased by Hajah from Laidlaw in 1990. However, other than the transfer of BTL from one corporate group to another, nothing changed at BTL as a result of the sale. No new employing authority took over, BTL remained as the employer and still is today. The bargaining rights of the Local Unions continued uninterrupted after the sale just as they were before and, the collective agreements between BTL and the Local Unions were not disrupted in any way. They have been in effect all along. In the circumstances, there is simply no need for the Board to issue a declaration that a sale has occurred or to name the Local Unions as the successor trade unions.

In the same vein, we need not spend much time on the allegations that BTS has somehow violated the 1989 order of the Board that was issued against BTL requiring that Teamsters be hired if a new terminal was opened in the Lower B.C. Mainland. BTS is clearly not the successor employer to BTL under section 44 of the Code. As we have said already, BTL continues to be the employer regardless of the sale. Even if there was some lingering responsibility under that order which, by the way, had long since expired when these applications were filed, NIT's terminal operations at Vancouver commenced back in 1989, well before BTL was purchased. In those circumstances, even if NIT could be found to be a related company to BTL, the order could hardly be said to be binding on NIT

retroactively once the sale took place. The order obviously could never have been intended to apply to these circumstances and these allegations by the Teamsters are therefore without foundation.

There is no dispute here about the Board's powers to do what the Teamsters seek vis-à-vis creating a single bargaining unit. Section 35 of the Code clearly allows the Board to declare the BTS group of companies named in the applications to be a single employer and a single federal work, undertaking or business for the purposes of Part I of the Code:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

The Board's plenary powers under section 18 of the Code also clearly provide a vehicle whereby bargaining unit structures previously decided upon by the Board can be reconsidered and varied:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

In this regard, the Board has said that it matters not if some of the bargaining agents affected by review applications such as this were voluntarily recognized.

Provided there is at least one certification order of the Board in the picture which is subject to an application for review, the Board's powers to determine the appropriateness of bargaining units and to include or exclude employees from a bargaining unit under sections 16(p)(v) and 27 of the Code prevail. (See Cape Breton Development Corporation (1987), 72 di 73; 19 CLRBR (NS) 212; and 88 CLLC 16,005 (CLRB no. 661)).

As for naming the Council as the exclusive bargaining agent for the proposed single bargaining unit, in our view, there may be a problem with this aspect of the applications. In MacCosham Van Lines Ltd. (1984), 56 di 192; 7 CLRBR (NS) 216; and 84 CLLC 16,051 (CLRB no. 474) the Board said that councils of trade unions could not obtain certified bargaining agent status through a review application under the then section 119 of the Code (now section 18). The rationale for that decision was that a council of trade unions is not included in the definition of a "trade union" in the Code and there were specific provisions under section 130 of the Code (now section 32) for councils of trade unions to obtain bargaining agent status and thus become a trade union for the purposes of the Code. These are exceptional provisions which allow the Board to join together two or more trade unions as a single bargaining agent and the Board was obviously of the view that a timely application for certification via section 130 was the proper route for Councils of Trade Unions to achieve bargaining agent status and that the review provisions of the Code could not be used as a shortcut.

In MacCosham Van Lines Ltd. supra, which also happened to involve the Council and two of the Local Unions that are party to these proceedings, the member trade unions of the Council had simply signed their bargaining rights over to the Council. Here, the same circumstances prevail. Each of the Local Unions have signed a document agreeing that their bargaining rights are to be transferred to the Council. This time, however, the Teamsters do not rely only on the review provisions of the Code to achieve bargaining agent status for the Council, they have added section 43 of the Code which deals with trade union successor rights:

"43. (1) Where, by reason of a merger or amalgamation of trade unions or a transfer of jurisdiction among trade unions, a trade union succeeds another trade union that, at the time of the merger, amalgamation or transfer of jurisdiction, is a bargaining agent, the successor shall be deemed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise."

Under these provisions of the Code, the Teamsters say that there has been a transfer of jurisdiction from the Local Unions to the Council and that as the successor trade union, the Council now holds the bargaining rights. They want the Board to confirm those successor rights by way of an order under section 43.

When we expressed some concern during the hearing about the merit of this part of the applications in light of the MacCosham decision, the Teamsters directed our attention to at least two instances where other panels of the Board have routinely accepted

similar circumstances to be valid section 43 applications and have named the Council as the successor bargaining agent (see Board letter decisions no. 886 dated May 17, 1991, and no. 1082 dated November 16, 1992).

While we do not wish to be overly restrictive or technical on this point, there seems to us to be little difference in the circumstances that were rejected by the Board in MacCosham and what we have here. The Teamsters have simply added another section of the Code to their application to avoid the need to make a timely application for certification as a council of trade unions through section 32 of the Code.

We also note that section 43 of the Code makes no mention of a transfer of bargaining rights as an ingredient that gives rise to trade union successor rights. In the circumstances, we have serious doubts that what occurred here could be considered a transfer of jurisdiction among trade unions as contemplated by section 43 of the Code.

For instance, an example of a real transfer of jurisdiction among trade unions was where the Canadian Labour Congress decided a couple of years ago to get out of the banking industry and transferred the jurisdiction of its Union of Bank Employees to other trade unions across the country. In British Columbia, for example, the jurisdiction to represent bank workers was taken over by the British Columbia Government Employees' Union (the BCGEU) and then, only after the majority of the affected employees had expressed their support for such a transfer to occur.

The effect was that the Union of Bank Employees disappeared from the scene and the BCGEU took over as the exclusive bargaining agent.

While we heard no evidence on this, the comments of the parties at the hearing and our many dealings with the Teamsters tell us that it is simply the bargaining rights in name only that the Local Unions have agreed to transfer to the Council here. Should the application succeed, the Local Unions will still be in place in that their representatives would still be at the bargaining table as members of the Council. BTS would also still have to deal with the Local Unions on a day-to-day basis as they would still administer any collective agreement that is arrived at within the confines of their own geographic jurisdictions. In addition, there are two other Locals of the Teamsters from Saskatchewan and Manitoba which go to make up the Council. Neither of these Locals have bargaining rights for any of the companies affected by these applications. If the Board were to grant the application under section 43, these Locals would, in effect, become the pre-certified bargaining agents through the Council for any future expansion of the BTS network into Saskatchewan or Manitoba. That, in our respectful opinion, can hardly be called a transfer of jurisdiction for the purposes of section 43 of the Code.

In any event, before we get to the point of deciding whether we can transfer the representational rights of the Local Unions to the Council using sections 18 and 43 of the Code, we first have to decide whether there

is going to be a single bargaining unit. For that to happen, we must first decide if the circumstances warrant a declaration under section 35 of the Code that BTS and the other named employers or undertakings are a single employer and a single undertaking for the purposes of Part I of the Code. If that part of the application fails, there is no need to go any further.

V

The overriding purpose of the Board's broad powers under section 35 of the Code is to prevent employers from avoiding their collective bargaining responsibilities by the relatively simple task of purchasing or creating second, spin-off or double-breasted companies to which they can syphon off bargaining unit work. The whole focus of section 35 is clearly aimed at the protection of existing bargaining rights and to prevent the undermining of collective agreements.

To attain those purposes, the Board has adopted the position that it is not necessary that all works, undertakings or businesses affected by a single employer declaration under section 35 of the Code be employers. Provided that they are all associated or related and that they are operated by at least two employers that are under common control and direction, any number of works, undertakings or businesses can be caught by a single employer declaration (see Emde Trucking Ltd. (1985), 60 di 66; 10 CLRBR (NS) 1 (CLRB no. 501)). The mere existence of two or more associated or related federal works, undertakings or businesses that are under common control is not

sufficient reason for the Board to exercise its discretion under section 35. For the Board to act, the work functions of the federal works, undertakings or businesses must be linked or be similar in nature and, there must be compelling labour relations reasons for the Board to join such entities together. These labour relations reasons must be tied to the purposes of section 35 which we have already described as being primarily intended to protect existing collective bargaining rights and privileges (see British Columbia Telephone Company (1977), 24 di 164; [1978] 1 Can LRBR 236; and 78 CLLC 16,122 (CLRB no. 108)).

In this case, the Board's afore-described established criteria for determining whether federal works, undertakings or businesses are associated or related and if they are being operated by two or more employers having common control and direction have clearly been met. BTS and the other named companies are obviously associated or related in that they are all owned by and are part of the "Assman Group". They are unquestionably operated by two or more employers, namely, SCL, BTL, NIT and MCL/DCL that are under common control and direction of the "Assman Family" through BTS and, they all operate in the trucking industry. In fact, it was never really in doubt in these proceedings that all of the named companies in these applications could, if there were compelling labour relations reasons for so doing, be declared to be a single employer and a single undertaking for the purposes of Part I of the Code.

To get over the "labour relation reasons" hurdle, the Teamsters claim that there is sufficient threat to their existing bargaining rights as well as to the

sanctity of their collective agreements to warrant Board action. Some evidence was adduced at the hearing regarding the alleged use of running rights of PGW and BTL to infringe upon the Teamster's bargaining rights by creating potential diversions for bargaining unit work. In fact, attempts were made to show that NIT and MCL/DCL employees were actually doing work that had previously been done by Teamster members for both SCL and BTL. The integration of the non-union operation of MCL/DCL into the network was also raised as a serious concern for the Teamsters vis-à-vis being a potential recipient of bargaining unit work.

It was also suggested that NIT had been set up deliberately to avoid the Teamster collective agreements and that the work now done by employees who are represented by the CBRT&GW is really Teamster bargaining unit work. The Teamsters also attempted to discredit the validity of the voluntary recognition of the CBRT&GW by NIT by raising allegations that the collective agreements entered into by these parties had never been ratified by the affected employees.

The Teamsters also argued that the MCL/DCL work in Alberta should have been theirs. They related how Mr. John MacLean was a Teamster member when he worked at PGW and implied that the Teamster bargaining rights should have followed him in 1985 as it was really the PGW operations that expanded into Alberta when DCL was set up. Similar employee movements between PGW and NIT operations at Vancouver were traced by the Teamsters to attempt to establish a continuity of Teamster presence at NIT after the expansion of PGW or NIF into Vancouver.

In response to all of these allegations by the Teamsters, BTS and the other named companies (BTS et al.) denied that there has been any deterioration in the scope of any of the Local Unions' bargaining units. In fact, documents were produced to show that Teamster membership had actually grown in the last couple of years. (The validity of this data was of course disputed by the Teamsters). As for the alleged syphoning off of Teamster bargaining unit work, BTS et al. emphatically denied that this had, or was about to happen. According to Mr. John Assman, NIT or any other company in the BTS network for that matter, are not performing any work functions that were previously done by Teamster members either at PGW which is now SCL, or at BTL. Nor are they about to. He reminded us that the NIT work at Vancouver, which seems to be the main target of the Teamsters applications, was previously done by agents, namely, Advance and Owl.

It was the position of BTS et al. that there are no labour relations reasons here to justify a single employer declaration and that the applications are but yet another attempt by the Teamsters through circuitous means, to take over the CBRT&GW's bargaining rights at NIT's warehouse and pick-up and delivery operations at Vancouver. Our attention was directed to the fact that Local 31 of the Teamsters had filed an almost identical application in 1989, which was before BTL even came into the picture. That application was withdrawn with prejudice by Local 31, just prior to a scheduled hearing (see Board File 560-232). Further, according to BTS et al., in late 1991 Local 31 attempted to organize the

employees at NIT but failed to gain enough support to file an application for certification.

For its part, CBRT&GW denied that there had been anything untoward in its voluntary recognition by NIT. While it took a very limited role at the hearing into these applications, the CBRT & GW made it very clear that if called upon by the Board it was prepared to meet the allegations of the Teamsters through viva-voce evidence. (In the circumstances, we did not feel that was necessary.) Simply put, the bottom line of the CBRT&GW's position was that the status quo should remain. If the employees that it represents at NIT wish to challenge the validity of its bargaining rights or if a majority wish to change bargaining agents there are procedures available to them in the Code to accomplish this.

VI

What we have here is not dissimilar to what was before the Board in Air Canada et al. (1989), 79 di 98; 7 CLRB (2d) 252; and 90 CLLC 16,008 (CLRB no. 771). There, the Board was dealing with an application under section 35 of the Code affecting Air Canada and several of its subsidiary companies including Air Nova Inc., Air B.C. Limited, and Air Ontario Limited. Without going into too much detail, following deregulation of the airline industry, established carriers found it necessary for survival to expand to capture as much of the market as possible. Air Canada acquired the other named companies which in effect created a network that served the domestic travelling public at all levels of the market in all regions of

the country. While these companies operate severally in their own regions and in their own specialized levels vis-à-vis equipment, they are undoubtedly operating under the control and direction of Air Canada. Furthermore, the Air Canada "Connector network" is clearly integrated in that passengers and baggage as well as freight are interlined throughout the system. Also, Air Canada services the "feeder" aircraft at some locations and provides ground services as well as some maintenance. In that case, the Board declined to make a declaration of a single employer and a single undertaking and it made the following comments:

"The purpose of section 35 is not to modify a collective bargaining relationship unless such relationship is, so to speak, under attack. Section 35 ... addresses the more subtle case of an employer acquiring authority over another related business while actually retaining control over its own. The Code then provides that the original employer's bargaining relationship with a union should not be diluted by reason of that employer's gaining control over a related business. ..."

For the Board to make a single employer declaration there must be convincing evidence that bargaining rights are actually being undermined or likely to be undermined. ... Section 35 is not to be used to enhance a collective bargaining relationship, but to preserve it. ..."

(Air Canada, supra; pages 120, 274; and 14,099; emphasis added)

In this case, we are dealing with the deregulated trucking industry where similar needs to survive have arisen as in the airline industry. Expansion through the creation of a "network" of companies to reach various regions and different levels of the transportation market, i.e., LTL and FTL and even small parcel courier service, has become commonplace.

The creation of these networks does not, however, change the rules when it comes to the application of section 35 of the Code. There still must be convincing evidence that existing collective bargaining rights and/or collective agreement benefits are being undermined.

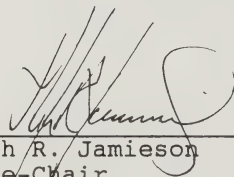
Such is not the case here. There was very little evidence to show that the existing bargaining rights of the Local Unions are under attack or that their collective agreements are in jeopardy. In fact, there appears to have been much more evidence of encroachment on bargaining rights and bargaining unit work in Air Canada, supra, where the application was dismissed. There, bargaining unit work that had been done exclusively by the subsidiary entities, such as maintenance for example, was apparently taken over and is being done by Air Canada employees. There is certainly nothing like that here. The Local Unions' bargaining rights and bargaining unit work remain as they have been for many years. Their problem appears to be that their bargaining rights, or jurisdiction as they refer to it, has not expanded along with the network and this appears to be the purpose of this whole exercise. Clearly the Teamsters, as BTS et al. correctly pointed out, want to extend their bargaining rights to take in the employees of NIT by ousting the CBRT&GW. This goes much further than the intended purpose of section 35 and, in the circumstances, it obviously cannot be permitted through these provisions of the Code. If the Teamsters want to "raid" the CBRT&GW they must do so through a timely application for certification under the appropriate provisions of the Code.

Taking all of the foregoing into consideration, the application for a single employer declaration under section 35 of the Code cannot succeed. There are simply no compelling labour relations reasons why the Board should exercise its discretion to declare that BTS et al. are a single employer and a single undertaking for the purposes of Part I of the Code.


Having so found, there is no need to deal any further with the concept of a single bargaining unit structure. Nor need we deal with the issue of the transfer of bargaining rights from the Local Unions to the Council using sections 18 and 43. This issue can be left for another day.

In the circumstances, all of the applications are dismissed.

The foregoing is a unanimous decision of the Board.



Hugh R. Jamieson
Vice-Chair



Calvin B. Davis
Member



Michael Eayrs
Member

DATED at Ottawa this 22nd day of February, 1993.

information

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Summary

André Cornellier and Michael A. Wood, complainants, Ottawa-Carleton Regional Transit Commission, employer, and Amalgamated Transit Union, Local 279, interested party.

Board File: 745-3962

Decision No.: 996

The Ottawa-Carleton Regional Transit Commission specifically directed a bus operator, and then all employees, not to wear buttons or pins, on their uniforms while on duty, signifying support for candidates in a union executive election campaign.

Two employees, one of whom had distributed campaign buttons advertising himself for the presidency of Local 279 of the Amalgamated Transit Union, and the other, also a candidate for union office, who had been told not to wear this button, filed a complaint alleging that OC Transpo's action constituted interference with the administration of a trade union or the representation of employees by a trade union, contrary to section 94(1)(a) of the Canada Labour Code (Part I - Industrial Relations).

The Board found on the facts of this particular case that there had been no violation of the Code. This decision was originally issued in letter form (letter decision no. 1111) but has been recast in the reasons format because it may be of wider public interest.

Ce document n'est pas officiel.
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peuvent être utilisés à des fins
juridiques.

Résumé

André Cornellier et Michael A. Wood, plaignants, Commission de transport régionale d'Ottawa-Carleton, intimée, et Syndicat uni du transport, section locale 279, partie intéressée.

Dossier du Conseil: 745-3962

Décision n° 996

La Commission de transport régionale d'Ottawa-Carleton a donné un ordre précis à un chauffeur d'autobus, puis à tous les employés, de ne pas porter sur leurs uniformes, pendant les heures de travail, des macarons pour indiquer leur appui des candidats aux postes de dirigeants syndicaux.

Deux employés se sont plaints que les mesures prises par la Commission constituaient de l'ingérence dans l'administration d'un syndicat ou la représentation des employés par un syndicat, en violation de l'alinéa 94(1)a) du Code canadien du travail (Partie I - Relations du travail). Un des employés avait distribué des macarons pour promouvoir sa candidature au poste de président de la section locale 279 du Syndicat uni du transport, et l'autre, qui avait reçu l'ordre de ne pas porter ce macaron, était lui aussi candidat à un poste de dirigeant syndical.

Le Conseil juge d'après les faits de la présente affaire qu'il n'y a pas eu violation du Code. La présente décision a d'abord été rendue sous forme de lettre (décision-lettre n° 1111), puis a été distribuée sous forme de motifs en raison de l'intérêt qu'elle pourrait susciter.



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**LES MOTIFS DE DÉCISION DU CCRT SONT
MAINTENANT ACCESSIBLES DANS QUICKLAW.**

Reasons for decision

André Cornellier and
Michael A. Wood,

complainants,

and

Ottawa-Carleton Regional
Transit Commission,

employer,

and

Amalgamated Transit Union,
Local 279,

interested party.

Board File: 745-3962

The Board was composed of Vice-Chairman Thomas M. Eberlee and Members J. Jacques Alary and François Bastien.

Appearances

Messrs. André Cornellier and Michael A. Wood, representing themselves;

Paul A. Webber, Q.C., representing Ottawa-Carleton Regional Transit Commission; and

Lisa Addario, representing Amalgamated Transit Union, Local 279.

These reasons for decision were written by Vice-Chairman Eberlee. The Board's decision originally appeared in letter form (Letter decision no. 1111) but is being issued in the reasons format since it may be of wider public interest.

complaint of André Cornellier and Michael A. Wood that the Ottawa-Carleton Regional Transit Commission (OC Transpo) had violated section 94(1)(a) of the Canada Labour Code (Part I - Industrial Relations) when it ordered Mr. Wood, and all its bus drivers, not to wear campaign buttons and pins while on duty during a union executive election campaign.

The facts are not complicated. Messrs. Cornellier and Wood, both bus operators employed by (OC Transpo), were respectively candidates for the office of president and secretary-treasurer of Local 279 of the Amalgamated Transit Union, the bargaining agent for the bulk of the operational staff of OC Transpo. The campaign for these and other executive offices of the local took place during June 1991. In the end, neither complainant was elected.

Mr. Cornellier provided his supporters with buttons which had the following message on them: "Vote President Votez Cornellier". On June 14, 1991, Mr. Wood was wearing one of these buttons just before he began his shift as a driver for the day. The superintendent of the depot, Gary Dean, noted the button and told him he would have to remove it from his uniform. Mr. Dean told the Board it has been OC Transpo policy not to allow the wearing of such insignia while on duty; he assumed Mr. Wood was about to go on duty and begin driving a bus and that is why he told him he would have to remove it.

Mr. Wood accepted the instruction of Mr. Dean. He removed the button and never wore it again during the remainder of the campaign. He did not seek to find out whether there was any occasion when OC Transpo would actually countenance

its being worn on a uniform in and around company premises. Nor did he file any grievance under the collective agreement.

The Board was told by both Mr. Cornellier and Mr. Wood that similar buttons had been displayed by their supporters during the 1988 election campaign and no issue had been made of them. It appears to the Board, however, that this occurred, if it did occur, only because OC Transpo management was unaware of what was going on. Mr. Cornellier conceded that he knew OC Transpo's policy was that employees while driving their buses, are not supposed to "adorn" their uniforms with unapproved things. He testified that he had seen OC Transpo memos or bulletins which permit only the wearing of a safety award pin, the incumbent union (A.T.U.) pin and/or a veteran's pin.

One supporter of Mr. Cornellier, Mario Villeneuve, reported that he had worn a Cornellier button in 1988 and had been told to take it off while on duty; he had continued to wear it while driving his bus but had made sure he covered it up or took it off when a superintendent was present who might have spotted it.

OC Transpo's transportation operations manager, J.R. Cody, testified that generally speaking the wearing of pins, buttons or emblems on operators' uniforms has been discouraged as a matter of long-standing policy. At a meeting of management, it was reported that some employees had been seen wearing the Cornellier pin and it was decided to remind employees of the policy of the employer. A memorandum was therefore issued by Denis R. Coupland, Director, Employee Relations, under date of June 14, 1991,

which stated as follows:

"CONDUCT GUIDELINES DURING UNION ELECTIONS

1. Campaigning, canvassing and the distribution of campaign materials should not interfere with the rights of other employees and the productivity and efficiency of operations.
2. The placement of campaign posters is restricted to the special Elections Board placed in each of the depots and garages.
3. Campaign materials may be distributed. However, OC Transpo facilities such as internal mail or the run bins in the Despatcher's Office are not to be used for this purpose.
4. Campaigning and canvassing of employees are to be restricted to times when employees are off duty, on lunch or coffee breaks, in the lunchroom or other common areas.
5. Campaign buttons and pins are not to be worn on Commission uniforms while on duty."

The Board was told that certain of the arrangements listed in the memorandum concerning the conduct of the election campaign had been worked out in advance between the officers of the local and the employer. For example, agreement had been arrived at as to the maximum size of candidates' election posters and as to the locations on company premises where they could be placed. These arrangements applied to all candidates for office - incumbents seeking re-election as well as all others. As for the rule against wearing candidates' campaign buttons or pins while on duty, there was no opposition to this from the responsible union officers who had negotiated these arrangements with management. The only opposition came from Messrs. Cornellier and Wood.

The essence of their complaint was that OC Transpo's rule against wearing such insignia, while "on duty", and, more

specifically, Superintendent Dean's instruction to Mr Wood to remove the Cornellier pin, constituted a violation by OC Transpo of section 94(1)(a) of the Code, which reads as follows:

"94. (1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; ..."

The Board understands that OC Transpo intended the term "on duty" to mean in the case of drivers only the period when a bus operator was driving his or her bus and was in the presence of members of the public. Thus, the prohibition was not intended to apply to an operator while he or she was doing anything else around OC Transpo premises, while not operating a bus. The Board is satisfied that Mr. Dean, when he told Mr. Wood to remove the button, was not stating any blanket prohibition, as Mr. Wood thought at the time, but was under the impression Mr. Wood was about to go and begin "duty" on his bus and intended only to convey to him the substance of OC Transpo's policy.

In attempting to apply and enforce such a policy, was OC Transpo participating in or interfering with the formation or administration of a trade union or the representation of employees by a trade union? Certainly, it was not participating in or interfering with the formation of Local 279 of the Amalgamated Transit Union. But what about the union's "administration" or "representation"?

II

Many of the previous cases in which the Board has had occasion to apply section 94(1)(a) have had to do with employer action during the course of the formation of a trade union. One of the Board's landmark cases involved some of the same parties as have appeared in the instant case. In Ottawa-Carleton Regional Transit Commission (1984), 56 di 203; and 7 CLRB (NS) 137 (CLRB no. 475), the Board ruled that OC Transpo was in violation of the "employer interference" provision when it sought to prevent supporters of ICTU from campaigning to displace the ATU as the bargaining agent during non-working time on OC Transpo premises and when it sought to prevent altogether the wearing of ICTU pins by its supporters.

The facts and the situation in the instant case are quite different. This was not an attempt by another union to form support and displace the incumbent union. This was a campaign by individuals to obtain seats on the executive of the incumbent union. The rules for the election campaign, at least as it might impact upon the employer and its interests, had been developed on the basis of explicit and implicit understandings between the then responsible officers and the employer. Those rules, as set out in Mr. Coupland's memorandum were not a unilateral determination by the employer, as appears to have been the case in CLRB decision no. 475.

By challenging the button rule, Messrs. Cornellier and Wood were actually telling OC Transpo that they wanted it to repudiate what the union's administration had accepted as

being fair to all candidates in the circumstances. Had OC Transpo done as Messrs. Cornellier and Wood appear to have desired, this would have been, in effect, interference with the administration of the union.

Under the factual circumstances here, the Board also cannot see that the button rule constituted interference with "the representation of employees by a trade union."

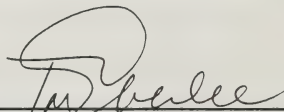
In coming to the conclusion that this complaint should be dismissed, the Board is basing its determination solely upon the facts of this particular case. It is by no means suggesting that section 94(1)(a) should be viewed as applying only to union organizing or raiding situations. Depending upon the facts, the section is open to being applied so as to prevent improper employer interference in any aspect of the on-going administrative life of a union, including a campaign for election to a union's executive board. In the instant case, however, the employer's action simply did not amount to the kind of participation or interference proscribed by the Code.

III

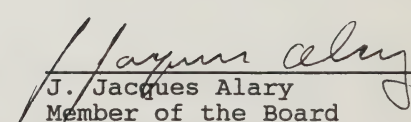
At the outset of the hearing, counsel for OC Transpo asked the Board to quash summonses which had been issued to Messrs. Cornellier and Wood to attend and to give evidence at the hearing; the point was made by counsel, among other things, that as the complainants, they did not need to be subpoenaed. This did not appear to be designed to prevent them from testifying. Messrs. Cornellier and Wood had not only secured summonses addressed to themselves but also to two other persons who appeared and testified during the

hearing. The complainants told the Board that in order to obtain time off from work they felt obliged to obtain subpoenas. The Board reserved its decision on the point.

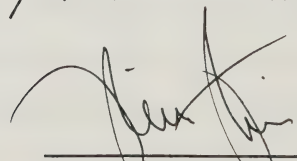
The Board had thought that its silence in Letter decision No. 1111 in respect of OC Transpo's proposition to have the summonses quashed answered the question. However, since receiving the letter decision, counsel for OC Transpo has raised the issue again. The Board, however, has no intention of quashing the subpoenas. Under the circumstances, and as matters ultimately developed, they may not have been necessary. On the other hand, when subpoenas are requested, the Board as a matter of course issues them. It does not engage in any prior enquiry as to their necessity unless some kind of protest is registered by the recipient. The issue raised by OC Transpo may have relevance in the context of the provisions of the collective agreement but not in the context of these complaints.



Thomas M. Eberlee
Vice-Chairman



J. Jacques Alary
Member of the Board



François Bastien
Member of the Board

ISSUED at Ottawa, this 24th day of February 1993.

information

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Summary

United Food and Commercial Workers
International Union, Local 175,
complainant applicant, and
Insurance Courier Services and
Lewis Couriers, Divisions of D & D
ICS Group Inc., respondent
employer.

Board Files: 745-4171
555-3426

Decision No.: 997

The Board is dealing in this case
with a complaint alleging
violations of sections 94(1)(a) and
94(3)(a) of the Canada Labour Code
(Part I - Industrial Relations) by
the employer and with an
application for certification by
the union for a unit consisting of
the employees affected by the
complaint.

Coincidentally with the application
for certification, the employer
terminated all bargaining unit
employees at its Sudbury branch and
continued carrying on its courier
business with a contractor instead
of with employees.

The Board concluded that the
employer had violated sections
94(1)(a) and 94(3)(a) of the Code
and ordered the reinstatement of
the terminated employees with
compensation.

With respect to the application for
certification the Board found that
pursuant to section 3(2) of the
Code the terminated employees were
employees of the employer at the
date of the application and, being
satisfied that the requirements of
section 28 of the Code were met,
certified the trade union.

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peuvent être utilisés à des fins
juridiques.

Résumé

Union internationale des
travailleurs et travailleuses unis
de l'alimentation et du commerce,
section locale 175,
plaignant/requérant, ainsi que
Insurance Courier Services et Lewis
Couriers, Divisions of D & D ICS
Group Inc., employeur intimé.

Dossiers du Conseil: 745-4171
555-3426

Décision n° 997

Dans cette affaire, le Conseil
statue sur une plainte de présumée
violation par l'employeur des sous-
alinéas 94(1)a) et 94(3)a) du Code
canadien du travail (Partie I -
Relations du travail) et sur une
demande d'accréditation présentée
par le syndicat en vue de la
création d'une unité dont feraient
partie les employés visés par la
plainte.

Au même moment où la demande
d'accréditation était présentée,
l'employeur congédiait tous les
employés faisant partie de l'unité
de négociation qui travaillaient à
la succursale de Sudbury et
continuait d'offrir ses services de
messagerie par l'entremise d'un
entrepreneur.

Le Conseil a conclu que l'employeur
avait violé les alinéas 94(1)a) et
94(3)a) du Code et il a ordonné
l'indemnisation et la réintégration
des employés congédiés.

En ce qui concerne la demande
d'accréditation, le Conseil a
conclu que, aux termes du
paragraphe 3(2) du Code, les
employés congédiés étaient des
employés de l'employeur à la date
de la demande. S'étant assuré que
les conditions énoncées à l'article
28 du Code avaient été remplies, le
Conseil a accrédité le syndicat.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

United Food and Commercial
Workers International Union,
Local 175,

complainant/applicant,

and

Insurance Courier Services
and Lewis Couriers,
Divisions of D & D ICS Group
Inc.,

respondent employer.

Board Files: 745-4171
555-3426

The Board was composed of Mr. J. Philippe Morneau, Vice-Chairman and Mr. Robert Cadieux and Ms. Mary Rozenberg, Members.

Appearances:

Mr. Douglas J. Wray, Counsel for the complainant applicant, accompanied by Mr. Don Morrin, Business Representative (UFCW); and

Mr. Michael W. Bader, Q.C. Counsel for the respondent employer.

These reasons for decision were written by Mr. J. Philippe Morneau, Vice-Chairman.

These reasons deal with a complaint of unfair labour practice filed with the Board on February 20, 1992 by the United Food and Commercial Workers International Union, Local 175 (the complainant, the applicant or the union)

alleging that Insurance Courier Services and Lewis Couriers, Divisions of D & D ICS Group Inc. (the respondent) terminated all of the employees of its Sudbury branch contrary to sections 94(1)(a) and 94(3)(a) of the Canada Labour Code (Part I - Industrial Relations) (Board file 745-4171).

These reasons also deal with an application for certification filed with the Board on the same date with respect to the employees of Insurance Courier Services (the employer) in the City of Sudbury, excluding managers and persons above the rank of manager. (Board file 555-3426).

A hearing was held in Sudbury on April 14 and 15, 1992, to deal with the issue of the Board's jurisdiction with respect to the application for certification and with respect to the complaint. The hearing was adjourned on April 15, at the request of the employer, who wished to present rebuttal evidence.

The hearing was not reconvened as the employer decided not to present rebuttal evidence. The parties then presented their submissions and arguments in writing.

II

At the hearing, the Board heard evidence from three witnesses on behalf of the employer, Mr. Brian Stanley, Vice-President Finance, D & D ICS Group Inc.; Mr. Cameron Joyce, Director of Operations for Insurance Courier Services and Lewis Couriers since 1991; and Mr. Patrick Gour, supervisor at the Sudbury branch of Insurance Courier Services.

It also heard evidence from six witnesses on behalf of the complainant, Ms. Joanne Martel, Ms. Diane Delorme, Mr. Dan Bennett, Mr. Robin Gosselin, Mr. Steven Mullin and Mr. Bernard Loyer. These were all employees of Insurance Courier Services who were terminated when the operations of the Sudbury branch were contracted out.

The factual evidence presented by these witnesses as well as the undisputed factual content of the Board's files and the investigating officer's report can be summarized as follows.

D & D ICS Group Inc. is a private corporation with its head office in Woodstock, Ontario. It began operating in Canada in 1976 and has two divisions, Insurance Courier Services and Lewis Couriers. Each of these divisions deals primarily with the insurance industry. The employer has intra and extra provincial licences in every province, with regular scheduled runs between provinces.

The Sudbury branch opened in 1986. Other than for billing purposes, no distinction is made within this branch between the work of the Insurance Courier Services Division and the Lewis Couriers Division, which both work out of the same facilities.

In 1986, when it first opened in Sudbury, the employer worked out of a 600 square foot location on Notre-Dame Street. This is when it began to retain full-time employees at this branch.

In March or April of 1991, the company moved to a larger location (1200 square feet) on Falconbridge Road in Sudbury. At that time, and later in the summer, the

employer purchased new office furniture and a kitchen set for the employees' lunch room.

Although the evidence indicates that from 1986 to the end of 1991, the number of pick-up points, the volume of business as well as the number of employees were gradually increasing, the employees were told that the employer was in financial difficulties in Sudbury.

Approximately one week before the 1991 Christmas party for the Sudbury branch, which was held on December 17, 1991, Mr. Paul Lipartiti, the branch manager, asked two employees, Diane Delorme and Joanne Martel to prepare statistics from 1986 to date. These statistics were derived from corporate documents called manifests and, according to the two witnesses, showed a very substantial increase in pick-ups during that period.

At the Christmas party, the branch manager made a short speech in which he mentioned that he was very pleased with the statistics and that the Sudbury branch was now in the black. Several of the employees got a Christmas bonus of \$40.00 or \$50.00.

Around New Year's day, Supervisor Pat Gour heard rumours about possible unionization of the Sudbury employees and mentioned this to his branch manager, Mr. Lipartiti. Mr. Lipartiti in turn reported this to Mr. Cameron Joyce, the Director of Operations, a couple of weeks before the operational change within the Sudbury branch. In his evidence, Mr. Joyce stated that it would be fair to say that the company preferred to remain non-union.

Approximately two weeks before the operational change, the

branch manager, Mr. Lipartiti, in a conversation with Diane Delorme, told her he wanted to hire an additional employee.

On or about January 11, 1992, Diane Delorme, on behalf of the Sudbury employees, contacted the Labour Council and, on the next day, spoke to Mr. Don Morrin, business agent of the union. A meeting was arranged to be held on Saturday, January 18, 1992. Twelve of the employees attended and signed union cards. Claude Rousseau had not been invited to the meeting since the employees feared that he would inform branch manager Lipartiti and supervisor Gour of the unionization efforts.

Sometime between January 11 and January 18, 1992, employee Bernard Loyer, whose duties required that he meet with the Montreal and Toronto line haul drivers, spoke to these other employees about the forthcoming union meeting of January 18, 1992. The Montréal driver, Mason Young, asked Mr. Loyer to keep him informed.

Joanne Martel got a wage increase the Friday before the changes affecting the Sudbury branch and Robin Gosselin was told on the Monday or Tuesday preceding the change that he would also get a wage increase.

In his testimony, Bernard Loyer indicated that on Sunday January 19, 1992, he told Mason Young, the Montreal line haul driver, that everyone had shown up at the January 18 unionization meeting and signed union cards. He gave this same information to two of the Toronto line haul drivers on January 20, 1992.

On January 21, 1992, the union filed an application for certification for this unit of Sudbury employees with the

Ontario Labour Relations Board. On that same day, Patrick Gour, a supervisor in the Sudbury branch, had a conversation with two employees, Daniel Rainville and Claude Rousseau, in the lunchroom. This conversation allegedly took place after a news broadcast that dealt with a company closure resulting from problems with a union. Mr. Gour stated, during this conversation, that in his opinion, Insurance Courier Services would close its doors if it was unionized. Mr. Gour insists that he stressed that this was his personal opinion.

During the morning of January 22, 1992, while company President Mr. Douglas Millard was at the Montreal branch, he and Mr. Brian Stanley, Vice-President of Finance, decided during a telephone conversation to contract out the work of the Sudbury branch. We are told by Mr. Stanley that this possibility had been discussed previously during the summer of 1991 and later in December 1991. No documentary evidence other than a financial statement which had been prepared during the week ending January 24, 1992 was provided to the Board to support this decision.

This decision was immediately communicated by Mr. Stanley to Cameron Joyce, who was asked to obtain a bid from Dynamex, a competitor, to take over the Sudbury operations and, as soon as that was done, was instructed to immediately conclude a deal with Dynamex. This was when Mr. Joyce was advised that the Sudbury operations were to be changed the next day.

When Bernard Loyer met Mason Young during his work shift on the night of January 22 to January 23 1992 he learned from Mason Young that all the Sudbury employees of the employer were being let go. He arrived at the office at

approximately 4:15 a.m. on January 23 and found out this was true.

On January 23, 1992, at the start of the work day, all the employees of the Sudbury branch of the employer except Paul Lipartiti, the branch manager, and Patrick Gour, the supervisor, were terminated. Mr. Cameron Joyce and Ms. Kristi Mallinson, Regional Manager (located in Toronto) were there to hand the employees their termination documents.

On January 31, 1992, the employer received a copy of the union's application for certification filed with the Ontario Labour Relations Board. On February 5, 1992, the employer challenged the Ontario Board's jurisdiction on the grounds that its operations were Federal.

The union filed its application for certification with this Board (file 555-3426) on February 20, 1992, the same day that it filed the complaint of unfair labour practice.

Since January 23rd, 1992 inclusively, the employer has been carrying on its business in Sudbury without any employees other than Mr. Paul Lipartiti and Mr. Patrick Gour. It has been operating through its contract with Dynamex.

III

With respect to the complaint of unfair labour practice, the employer submits that its decision to terminate its employees in Sudbury and to enter into a contract with Dynamex was based solely on legitimate business concerns. The employer analyzed extensively the evidence heard to support this position.

The employer further submits, should the Board find that it did commit an unfair labour practice as alleged, that the reinstatement requested by the union is inappropriate since the decision to terminate the employees would then allegedly be based on a mixed motive and that an employer ought not to be forced to re-open a business that it has closed down.

With respect to the certification application, the employer submits that since it should not be forced to re-open the branch, there is simply no bargaining unit to certify.

The Union, on the other hand, submits that with respect to the complaint of unfair labour practice, the employer has not proven that anti-union animus played no part whatsoever in its decision to terminate its employees and contract out its work in Sudbury on January 23, 1992.

The union also submits that the Board ought to infer from the evidence that there was anti-union animus with respect to the termination and that there was interference in the representation of the employees by the trade union.

It further submits that the Board should draw a negative inference against the employer because of its failure to call certain witnesses, namely the President, Douglas Millard, the Regional Manager Kristi Mallinson and the branch manager Paul Lipartiti.

In connection with the appropriate remedy, the union submits that since the employer's business in Sudbury was not closed but rather contracted out, it is entirely appropriate that the employees be reinstated.

On the issue of certification, the union submits that, by virtue of section 3(2) of the Code, if the Board finds that the employees have been terminated contrary to the Code, then the union ought to be certified whether or not the Board orders reinstatement of the employees. In its opinion, this simply holds even more true if the Board reinstates the employees.

IV

Neither of the parties raised the issue of the Board's jurisdiction in this matter but the Board made its own determinations in this regard. The introductory evidence relating to the nature of the employer's business satisfied the Board that the employer's business was a federal business by virtue of section 92(10)(a) of the Constitution Act, 1867:

"92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,-

...

10. Local Works and Undertakings other than such as are of the following Classes:-

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province; ..."

Sections 94(1)(a) and 94(3)(a) of the Code state:

"94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

...

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

(iv) has made or is about to make a disclosure that the person may be required to make in a proceeding under this Part,

(v) has made an application or filed a complaint under this Part, or

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;"

It is well established in unfair labour practices of this nature that the proper test to be applied is whether anti-union animus was a proximate cause for the decision giving rise to the complaint or, in other words, if the decision was in any way tainted by anti-union animus (see Gardewine and Sons Limited (1981), 45 di 124; and 81 CLLC 16,135 (CLRB no. 328); Air Atlantic Limited (1986), 68 di 30; and 87 CLLC 16,002 (CLRB no. 600); and Iberia Airlines of Spain (1988), 74 di 1 (CLRB no. 687)).

Furthermore, section 98(4) of the Code states that:

"98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on

behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party."

The burden of proof is therefore on the employer to demonstrate, according to the balance of probabilities, that its decision was motivated solely by legitimate business concerns. (See Larose-Paquette Autobus Inc. (1990), 83 di 175 (CLRB no. 840); Northland Beverages (1956) Ltd. (1991), 85 di 215 CLRB no. 885); and Cablevision du Nord de Québec Inc. (1988), 73 di 173 (CLRB no. 681).

In cases of this nature, it is not often that an employer will admit that its conduct was motivated at least in part by anti-union animus. See Air Atlantic Limited, supra:

"Seldom is there direct evidence of anti-union animus in section 184(3)(a) complaints, rarely do employers stand up and admit that their actions were motivated by an underlying desire to operate their business without the encumbrance of collective bargaining. More often than not the issues come down to credibility and the cases turn on what the Board sees as the reasonable balance of probabilities given the circumstances before it. ..."

(page 36)

and Clipper Navigation Limited (1991), 92 CLLC 16,004 (CLRB no. 900):

"Like most other cases of this nature, there is no direct evidence to substantiate the union's claims that the employer's conduct was motivated entirely or at least in part by its resistance to the collective bargaining principles enshrined in the Code. It is therefore necessary for the Board to sift through the particular facts to see if there are inferences which can be drawn which point to any taint of anti-union animus."

(page 14,029; emphasis added)

Thus, in the present case, with respect to the complaint made pursuant to section 94(3)(a) of the Code, the Board, based on the above principles and after a careful examination of the evidence presented, determines that the employer has not discharged the onus placed on it by section 98(4) of the Code. The employer has not satisfied the Board that its decision to terminate its employees was not tainted by anti-union animus.

The major factors which led the Board to this conclusion are as follows: the paucity of documentary evidence to indicate that top management had already been concerned with the performance of the Sudbury branch; the fact that the company was growing shortly before the events complained of; the so-called coincidental nature of the termination with the application for certification and the general climate within the organization.

We must also state that, while there is no property in a witness, one would normally expect witnesses who would give evidence favourable to one of the parties to be called by that party. The failure of the employer to call as witnesses its President, Mr. Douglas Millard who, we are told, was instrumental in the decision to terminate the employees and contract out the work, and Mr. Paul Lipartiti, around whom a substantial amount of the union's evidence revolved, also influences the Board's conclusion.

In connection with the complaint pursuant to section 94(1)(a), for which there is no reverse burden of proof, the union has succeeded in demonstrating to the Board, through the testimony of its witnesses and through certain admissions made by the employer's witnesses that the employer has indeed committed an unfair labour practice

contrary to section 94(1)(a) of the Code.

The powers of the Board are remedial and not punitive in nature. In cases where an employer has terminated employees in contravention of the Code, the normal remedy has been to reinstate the employees with compensation and to place them in the same situation they would have been in had the unfair labour practice not occurred. See North Canada Air Ltd. (Norcanair) (1979), 35 di 129; [1979] 3 Can LRBR 239; and 79 CLLC 16,194 (CLRB no. 204); and Worldways Canada Limited (1984), 55 di 151 (CLRB no. 459).

The employer has submitted that this would not be appropriate in this case and bases its arguments on Westinghouse Canada Ltd. (1980), 80 CLLC 785 (Ont.); Humpty Dumpty Foods Limited, [1977] 2 Can LRBR 248 (Ont.); and Toronto Call Answering Service, [1978] 1 Can LRBR 183 (Ont.).

With the utmost respect, we do not agree. The above cases cited by the employer were all cases where the employer had terminated its employees and closed its whole operation in the location in question. In other words, the employer had ceased to carry on business. What occurred here was that all the employees were terminated and their work contracted out. The employer continues to carry on its business in Sudbury, the only difference being that it deals with a contractor instead of with its own employees.

With respect to the application for certification filed with the Board, section 3(2) of the Code states:

"3.(2) No person ceases to be an employee within the meaning of this Part by reason only of his ceasing to work as the result of a lockout or strike or by reason only of his dismissal contrary to this Part."

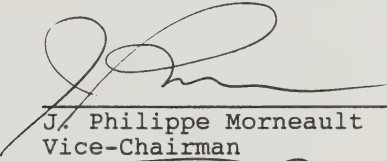
Thus the employees who have been dismissed in this case did not cease to be employees. And of course, if they are reinstated, there is no doubt that this would be so.

For all of the reasons stated above, the Board makes the following declarations and orders:

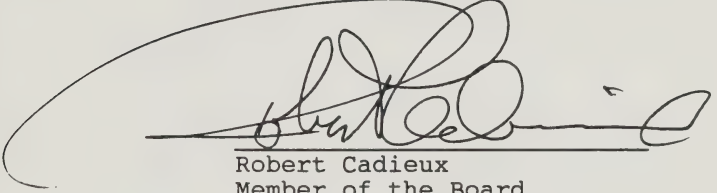
1. The Board declares that the employer has violated sections 94(1)(a) and 94(3)(a) of the Code by dismissing the employees of its Sudbury branch as it did.
2. The Board directs the employer to cease and desist violating the Code.
3. The Board directs the employer to reinstate the employees forthwith in the same jobs they held prior to their dismissal, with the same conditions of employment and rates of pay.
4. The Board directs the employer to compensate each of the employees for the amounts he or she would have earned from the date of dismissal to the date of reinstatement, less any monies which he or she actually received during this period.
5. The Board, being satisfied that the employees constitute a unit appropriate for collective bargaining and that a majority of the employees of the employer in the unit wish to have the Union represent them as their bargaining agent, shall certify the trade union as the bargaining agent for the bargaining unit.

The Board appoints Ms. Carol Garrow, Senior Labour Relations Officer, of its Toronto regional office, to assist the parties in the implementation of the said orders.

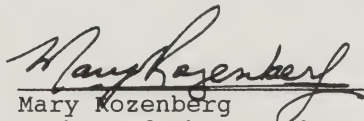
The Board retains jurisdiction to deal with any question which may arise with respect thereto and which the parties cannot resolve.



J. Philippe Morneau
Vice-Chairman



Robert Cadieux
Member of the Board



Mary Kozenberg
Member of the Board

ISSUED at Ottawa, this 24th day of February 1993.

CLRB/CCRT - 997

information

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Only the Reasons for Decision can
be used for legal purposes.

Summary

International Association of
Machinists and Aerospace Workers,
Local Lodge 2413, applicant and
complainant union, Air Canada,
Executive Security Services Ltd.
and Teamsters Local Union 938,
respondents, and Aeroguard Security
Services, interested party.

Board Files: 560-224
585-350
745-3303
745-3385
750-20

Decision No.: 998

The International Association of
Machinists and Aerospace Workers,
Local Lodge 2413 (IAM), sought to
retain the bargaining rights when
Air Canada and the other airlines
operating out of Terminal 2 at
Pearson International Airport
changed their pre-board screening
contractor from Aeroguard Security
Services (Aeroguard) to Executive
Security Services Ltd. (Executive)
in mid-1989.

The IAM had been certified to
represent pre-board screening staff
of Aeroguard and there was a
collective agreement in force
between the parties. Aeroguard's
contract with Air Canada and the
other airlines expired, bids were
invited and Executive won the
contract on the basis of being the
lowest tenderer. Executive had,
prior to winning the contract,
voluntarily recognized the
Teamsters union and had entered
into a collective agreement with
the Teamsters.

Ce document n'est pas officiel.
Seuls les Motifs de décision
peuvent être utilisés à des fins
juridiques.

Résumé

Association internationale des
machinistes et des travailleurs de
l'aérospatiale, section locale
2413, syndicat requérant et
plaignant, Air Canada, Services de
Sécurité Executive Ltd. et la
section locale 938 du syndicat des
Teamsters, intimés, et Services de
sécurité Aeroguard, partie
intéressée.

Dossiers du Conseil: 560-224
585-350
745-3303
745-3385
750-20

Décision n° 998

L'Association internationale des
machinistes et des travailleurs de
l'aérospatiale, section locale 2413
(l'AIM), a tenté de conserver les
droits de négociation lorsqu'Air
Canada et d'autres sociétés
aériennes qui exploitent leur
entreprise à partir du Terminal 2
de l'Aéroport international Pearson
ont décidé, au milieu de 1989, de
confier à Services de Sécurité
Executive Ltd. (Executive) les
services de vérification pré-
embarquement assurés auparavant par
Services de sécurité Aeroguard
(Aeroguard).

L'AIM avait été accréditée pour
représenter le personnel
d'Aeroguard affecté à la
vérification pré-embarquement, et
une convention collective liait les
parties. Le contrat conclu entre
Aeroguard et Air Canada et les
autres sociétés aériennes a pris
fin; un appel d'offres a été lancé
et Executive a été choisie parce
qu'elle était le plus bas
soumissionnaire. Executive avait,
avant l'octroi du contrat, reconnu
volontairement le syndicat des
Teamsters et avait conclu une
convention collective avec ce
syndicat.

The IAM asked the Board to find that Air Canada and Aeroguard had been under "common control or direction" and were a single employer under section 35 of the Canada Labour Code (Part I - Industrial Relations). It also asked the Board to find that Air Canada and Executive were a single employer under section 35. It further contended that the Air Canada/Aeroguard "employer" had transferred the pre-board screening business to Air Canada/Executive and that a sale of business had occurred within the meaning of section 44 of the Code, or that alternatively Aeroguard had sold its business to Executive, also within the meaning of section 44.

The Board found that the contracts between Air Canada and Aeroguard, on the one hand, and between Air Canada and Executive, on the other, were real contracts between two distinct employing entities doing distinct and separate jobs and did not establish fact situations which could justify single employer declarations. Nor was there, in the Board's view, any sale of business within the meaning of section 44 when Aeroguard ceased to be the contractor and Executive began to perform the service under its contract.

The IAM also alleged that Air Canada and Executive had breached sections 94, 95 and 96 of the Code in respect of Executive's bargaining with the Teamsters and entering into a collective agreement and because of Executive's failure to hire certain pre-board screening personnel who had been employed by Aeroguard. The IAM also asked the Board to give consent, pursuant to section 104, for it to institute a prosecution against Executive and the Teamsters because Executive was refusing to be bound by the IAM collective agreement.

L'AIM a demandé au Conseil de juger que le contrôle ou la direction d'Air Canada et Aéroguard étaient assumés en commun et que ces sociétés constituaient un employeur unique au sens de l'article 35 du Code canadien du travail (Partie I - Relations du travail). Elle lui a également demandé de juger qu'Air Canada et Executive étaient un employeur unique au sens de l'article 35. Par ailleurs, elle a prétendu que l'«employeur» Air Canada/Aéroguard avait transféré la fonction de vérification pré-embarquement à Air Canada/Executive et qu'il y avait eu vente d'entreprise au sens de l'article 44 du Code, ou qu'Aéroguard avait vendu son entreprise à Executive, au sens de l'article 44 du Code.

Le Conseil a jugé que les contrats conclus entre Air Canada et Aéroguard, d'une part, et entre Air Canada et Executive, d'autre part, étaient de véritables contrats entre deux employeurs distincts qui effectuent des travaux distincts et ne constituaient pas une situation factuelle qui pourrait justifier des déclarations d'employeur unique. De l'avis du Conseil, il n'y a pas eu vente d'entreprise au sens de l'article 44 lorsqu'Aéroguard a cessé d'être l'entrepreneur et qu'Executive a commencé à assurer le service en vertu de son contrat.

L'AIM a en outre allégué qu'Air Canada et Executive avaient violé les articles 94, 95 et 96 du Code en ce qui a trait aux négociations entre Executive et le syndicat des Teamsters et à la convention collective conclue entre les parties et en raison du fait qu'Executive n'avait pas embauché certains préposés à la vérification pré-embarquement employés auparavant par Aéroguard. L'AIM a de plus demandé au Conseil de donner son consentement aux poursuites, en conformité avec l'article 104, contre Executive et le syndicat des Teamsters parce qu'Executive avait refusé d'être liée par la convention collective de l'AIM.

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CLRB REASONS FOR DECISION ARE NOW AVAILABLE ON QUICKLAW.

LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

The Board found all aspects of these complaints to be without merit and dismissed them, except one: it determined that the refusal or failure of Executive to hire John Miller, the chief steward for the IAM in the Aeroguard unit, constituted a violation of section 94(3)(a)(i) of the Code.

The dissenting member would also have dismissed the application for a declaration of single employer but for reasons having to do with the Board's discretionary power to grant such application.

Le Conseil a jugé que tous les aspects des plaintes étaient sans fondement et il les a rejetées, sauf une. Il a jugé que le refus par Executive d'embaucher John Miller, le délégué en chef de l'AIM au sein de l'unité d'Aéroguard, constituait une violation du sous-alinéa 94(3)a)(i) du Code.

Le membre dissident aurait également rejeté la demande de déclaration d'employeur unique mais pour des motifs tenant au pouvoir discrétionnaire du Conseil de faire droit à une telle demande.

Reasons for Decision

International Association of
Machinists and Aerospace
Workers, Local Lodge 2413,

*applicant and complainant
union,*

Air Canada, Executive
Security Services Limited,
Teamsters Local Union 938,

respondents,

and

Aeroguard Security Services,
interested party.

Board Files: 560-224
585-350
745-3303
745-3385
750-20

The Board consisted of Thomas M. Eberlee, Vice-Chairman,
and Ginette Gosselin and Robert Cadieux, Members.

Appearances

Mr. Lorne A. Richmond, for the International Association of
Machinists and Aerospace Workers, Local Lodge 2413;

Mr. Douglas G. Gilbert, for Air Canada;

Mr. Richard J. Nixon, for Executive Security Services; and

Mr. Harold F. Caley, for Teamsters Local Union 938.

These reasons for decision were written by
Mr. Thomas M. Eberlee, Vice-Chairman. Ms. Gosselin
disagrees with the majority's findings concerning the
application for a single employer declaration. Her
dissenting reasons are attached.

I

By way of applications and complaints, the International Association of Machinists and Aerospace Workers, Local Lodge 2413 (IAM), sought to assert that it continued to be the bargaining agent for pre-board security screening personnel at Terminal 2 of Pearson International Airport when a contract held by Aeroguard Security Services (Aeroguard) ended on or about July 16, 1989 and another company, Executive Security Services Limited (Executive), began operating under a new contract after that date. The IAM also asked the Board to make remedial and other orders respecting various violations of the Canada Labour Code (Part I - Industrial Relations) which, it alleged, flowed from, or were associated with, the changeover from Aeroguard to Executive. The IAM's applications and complaints brought Teamsters Local Union 938 into the picture on the basis that the Teamsters and the new contractor, Executive, were in a voluntarily recognized collective bargaining relationship, and, in fact, had a collective agreement applying to pre-board screening personnel before and at the time of this changeover.

During the course of the hearing, the IAM's case changed somewhat from that set forth in the original applications and complaints. As outlined by counsel in argument, the IAM's basic contention was that Air Canada and Aeroguard were - and should be declared by the Board to have been - a single employer under section 35 of the Code in respect of the employment of the pre-board screening personnel. Moreover, the new "contractor" from July 17, 1989, Executive, was, with Air Canada, also a single employer under section 35. The transaction that resulted in the

pre-board screening activity moving from Air Canada/Aeroguard as employer to Air Canada/Executive as employer was a sale of business within the meaning of section 44 of the Code. Alternatively, the IAM argued that the Board should find there had been a sale of business within the meaning of the Code between Aeroguard and Executive. The net result, in the view of the IAM, was that it still held the bargaining rights for the employees involved.

The foregoing bald summary is the Board's understanding of the applicant/complainant union's final position before the Board. This portion of the proceeding was initiated by applications contained in file 560-224 (single employer declaration under section 35) and file 585-350 (sale of business and successorship declaration under section 44), both of which were filed on or about July 31, 1989.

The IAM also filed on the same date (file 745-3303) a complaint alleging that Air Canada and/or Executive had acted contrary to a number of the aspects of sections 94 and 96 of the Code:

- Executive, by entering into a collective agreement with Teamsters Local Union 938, participated in the administration or representation of employees by a trade union and contributed support to that trade union, contrary to sections 94(1)(a) and (b);
- the respondents, by not continuing to employ, or by refusing to employ after July 16, 1989, many members of the IAM bargaining unit because these persons were IAM supporters, violated sections 94(3)(a)(i), 94(3)(a)(iii), 94(3)(b), 94(3)(e) and 96 of the Code.

The IAM asked for various remedies, including an order that the foregoing persons be hired by the respondents and be compensated for alleged lost wages, that the Teamsters/Executive collective agreement be declared to be of no force and effect and that the parties comply with the terms and conditions of the IAM/Aeroguard collective agreement. In addition, the complainant union asked the Board for consent, pursuant to section 104, to institute a prosecution against the respondents "for their refusal to be bound by the collective agreement entered into in respect of this bargaining unit and thereby violating the provisions of section 56 of the Code." (This was given file number 750-20.)

Finally, also on July 31, 1989, the IAM asked the Minister of Labour, pursuant to section 97(3) of the Code, for permission to make a complaint to the Board alleging a violation by Air Canada and Executive of section 94(3)(g) because Executive and Teamsters Local Union 938 had entered into a collective agreement when the IAM was allegedly already the bargaining agent for that unit of employees. At the same time, the IAM asked for ministerial consent to complain to the Board that Teamsters Local Union 938 violated sections 95(a) and (b) by allegedly seeking to compel Air Canada and/or Executive to bargain with it when it was not the bargaining agent and by entering into a collective agreement when it knew or ought to have known that another union was the bargaining agent. Consent from the Minister came forth on October 3, 1989. (This is file 745-3385.)

The provisions of the Code invoked in the applications or alleged to have been breached read as follows:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business.

...

44.(1) In this section and sections 45 and 46, 'business' means any federal work, undertaking or business and any part thereof;

'sell', in relation to a business, includes the lease, transfer and other disposition of the business.

(2) Subject to subsections 45(1) to (3), where an employer sells his business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.

...

56. A collective agreement entered into between a bargaining agent and an employer in respect of a bargaining unit is, subject to and for the purposes of this Part, binding on the bargaining agent, every employee in the bargaining unit and the employer.

...

94.(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

(b) contribute financial or other support to a trade union.

...

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

...

(iii) has testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part,

...

(b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Part;

...

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;

...

(g) bargain collectively for the purpose of entering into a collective agreement or enter into a collective agreement with a trade union in respect of a bargaining unit, if another trade union is the bargaining agent for that bargaining unit.

95. No trade union or person acting on behalf of a trade union shall

(a) seek to compel an employer to bargain collectively with the trade union if the trade union is not the bargaining agent for a bargaining unit that includes employees of the employer;

(b) bargain collectively for the purpose of entering into a collective agreement or enter into a collective agreement with an employer in respect of a bargaining unit, if that trade union or person knows or, in the opinion of the Board, ought to know that another trade union is the bargaining agent for that bargaining unit;

...

96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union."

The Board began the process of hearing the applications and complaints on March 6, 1990 and continued the hearing on March 7 and 8, 1990. Because of the complexity of the case and the number of parties and witnesses, the hearing could not be completed in the three days first set aside. It was therefore carried on over a further 12 days - July 3, 4, 5 and 6, 1990, February 5 and 6, 1991, October 8, 1991, September 24 and 25, 1992 and October 6, 8 and 9, 1992. This Board panel is not happy that there was such a lengthy span of time between the start and the finish of the hearing. However, in this instance, a combination of bereavement, illness, accident and other factors too

numerous to list here, together with the number of parties and counsel, led to several unavoidable, last-minute cancellations and created ongoing scheduling problems.

II

In these reasons for decision, the Board will not attempt to report in detail the testimony and sometimes conflicting evidence it heard from the numerous witnesses. Instead, without necessarily engaging in detailed analysis of what the parties sought through those witnesses to have the Board believe pro and con the IAM's many allegations, it will attempt to outline here what it considers are the basic facts of the situation and finally what those facts have led it to conclude.

III

The Aeronautics Act of Canada and its regulations require, among many other things, that airlines flying out of Canadian airports screen all passengers and their hand baggage before allowing them to board flights. The security screening process is so familiar to all Canadians who have ever flown that it does not need to be described here. That process is carried on under the strict requirements of the Act, the regulations and various rules, approvals and directives established, and monitored closely, by Transport Canada and the RCMP.

Generally speaking, the airlines using the airports across Canada are tenants of the terminal facilities from which they operate. Until recently, in most cases, these facilities were owned by Transport Canada. This is still true at Terminal 2, Toronto International Airport, although

Air Canada so dominates the scene that the terminal appears to be Air Canada's. It carries on roughly 87% of the flying business originating from that facility. However, some 30 other airlines also make use of that terminal, but their "terminalling" services are provided for them mainly by Air Canada.

The usual practice at terminals across Canada is that the various airlines using a particular terminal band together to arrange for, and have provided for them, a pre-board screening service. Seldom, if ever, does each airline at a terminal arrange directly and separately to provide its own service.

At Terminal 2, Air Canada, the predominant user of the facility, and the other airlines have over the years come together to provide for the necessary pre-board screening services. Air Canada has never directly and through its own personnel provided pre-board screening at Terminal 2. It is, however, the usual practice for the major carrier (in terms of business) at any terminal to take the administrative lead in arranging for and generally overseeing the provision of the service for all the airlines at the facility. Thus it is that at Terminal 2, Air Canada plays the lead role as the "designated representative." Exhibits filed with the Board indicate that Air Canada and each of the other airlines pays a share of the cost of security services based upon its share of the total flying business out of Terminal 2. Air Canada collects from each of the other airlines an additional percentage of each airline's particular share of the total bill in order to defray its (Air Canada's) administrative expenses as designated representative.

Until July 16, 1989, Aeroguard was in a contractual relationship with Air Canada and the 30 other airlines at Terminal 2 to provide pre-board screening services for the flights of each of them. Towards the end of its contract, Aeroguard had some 275 to 290 persons screening passengers, via the metal detection "doorways" and the "wands," and x-raying carry-on baggage. Aeroguard also had a contract to do this work for the airlines operating in and out of Terminal 1. This latter contract did not expire until some months after July 16, 1989.

The contract which Aeroguard had for the Terminal 2 screening operation ran from June 1, 1987 to May 31, 1989 and was later extended to July 16, 1989. According to the document, the contract is between the pre-board screening contractor and each of the airlines which has signed it, including, of course, the named "designated representative," Air Canada. The document seems to be at pains to make the point that each airline has contracted separately for security services, notwithstanding that Air Canada has been appointed to act as the administrator of the contract on behalf of all the signatories and is the party that initially pays the contractor's invoices.

The terms of the contract, among many other things, provide that the "Airline Committee," made up of representatives of all the airlines, will have a certain role to play in the administration of the contract in addition to Air Canada, as the designated representative. For example, the Airline Committee will consult regularly with the contractor regarding its performance of the contract and will establish, together with the contractor, "operating procedures" under which the services will be performed.

The contract is extremely detailed, although not unexpectedly so under the circumstances. It appears to cover every conceivable way of meeting its stated objective, which is "to prevent the boarding of explosive devices, weapons, and dangerous objects, so as to ensure the safe process of all flights and airport operations." It goes on to provide specifications as to many of the means and procedures required.

The contractor is called upon to provide a sufficient number of trained personnel to perform the security screening of passengers and their carry-on baggage. It is responsible for staffing, training, assignment and supervision of personnel. The service is to be provided via "qualified, uniformed, well-groomed, diligent and efficient employees." The contractor must ensure that personnel carry out the work in accordance with the terms and conditions of the agreement, plus all applicable laws, regulations and orders - that is to say, with the service specifications attached to the contract, with the Aeronautics Act and regulations, with any directives coming from time to time from the Airline Committee and so forth.

The contractor is solely responsible for obtaining all operating approvals, licences and certificates required by police and other authorities for the contractor itself and for individual employees.

Other requirements placed upon the contractor include:

- worker's compensation coverage of employees;
- compliance with all applicable federal, provincial laws, rules and regulations, including employment law;

- employer's liability, public liability and indemnification, insurance coverage;
- making its own arrangements with the airport authorities (in this case Transport Canada) for office and accommodation space, internal communications facilities and office furniture;
- providing a manager for its services and supervision for its own personnel "for the day-to-day performance and administration of the Agreement, including but not limited to deployment/scheduling of shifts, liaison with the Airlines' managements, special requirements, etc.";
- ensuring that employees wear a standard uniform that is clearly distinguished from airline personnel uniforms, the colour and cut of which is to be subject to the approval of the Airline Committee;
- ensuring that there is always somebody proficient in both official languages and that there is one female and one male security person present and on duty at each security check point on each shift.

Anybody who, in the opinion of the Airline Committee, does not meet the bilingual requirement or is "intemperate, incompetent, negligent or dishonest in the performance of his/her duties" shall be removed from the job by the contractor, if asked to do so by the Airline Committee. (What happens to such an individual thereafter - what the contractor then does to him/her by way of transfer to another job somewhere else, firing or whatnot - is entirely up to the contractor as the employer.)

All parties (Air Canada and each of the individual airlines signatory to the agreement plus the contractor) have rights to terminate the agreement on stated grounds subject to specific notice periods.

Most of the equipment - the doorways, x-ray machines, etc. - used for the screening process is provided at Terminal 2 by Transport Canada. Other equipment, such as communication devices, is the responsibility of the contractor. Transport Canada plays a significant role vis-à-vis the screening system and individual employees by maintaining a rigorous and constant monitoring surveillance. If Transport Canada spots problems with the system, it reports them to Air Canada, as the "designated representative"; Air Canada, in turn, takes them up with security screening contractor.

The contract sets out the hours during which pre-board security screening services will have to be available. Generally, these hours run from the pre-dawn hours to midnight - the time span during which Transport Canada allows flights to take off from Pearson International Airport. Services must be available every day of the year. The contractor is paid on the basis of the total number of "person hours" worked to provide the required service. The contract estimates that the minimum number of hours will be approximately 6 000 per week. (That number varies throughout the year, depending on the seasonal departure traffic volume.) The contract sets out one amount per hour per person to be paid for regular hours, another higher amount per hour per person for overtime hours and a third, and considerably higher rate, for statutory holiday hours. These hourly rates are inclusive of all of the contractor's costs and expectations: wages, fringes, unemployment

insurance, vacation pay, uniforms, training, supervision, profit, overheads, office rental costs and all other operating and administration costs.

On a bi-weekly basis, the contractor invoices Air Canada as the designated representative; the latter then pays and invoices each of the other airlines for its share of the total cost plus an administration fee to defray Air Canada's expenses.

As has been indicated earlier, this contract, with some minor changes that are not relevant here, operated between July 1, 1987 and May 31, 1989 and was extended to July 16, 1989.

IV

In the spring of 1988, the Minister of Transport and his officials expressed concern to Air Canada and the other airlines about the effectiveness generally of the pre-board screening system across Canada. It was indicated that Transport Canada might well take over directly the responsibility for screening and might carry it out through its own airport staff or through police auspices, as had apparently been proposed by a Parliamentary committee. Concern was also voiced about the adequacy or otherwise of wages being paid to, and working conditions of, pre-board screening personnel. As a result, there were to be discussions between the airlines and Transport Canada over such issues as wages, contract duration, performance pay, turnover rates, and "other matters impacting on job performance" (letter from Honourable C. Crosbie, then Minister of Transport, to the then President of Air Canada).

The upshot of the discussions was an understanding that future contracts would be for a duration of three years, that means would be found to require higher minimum compensation rates to be paid by contractors, that, in tendering for new contracts, contractors would be expected to undertake to provide for wages and fringe benefits at least equal to those prevailing under the outgoing contract and that a senior guard classification would be established so as to give employees a promotion incentive. There was also an understanding on other improvements, such as better training, closer monitoring and the provision by Transport Canada to contractors of space in terminal buildings for better amenities for pre-board screening staff.

V

The IAM was the bargaining agent for all security employees of Aeroguard working at both Terminals 1 and 2 of Pearson International Airport. A collective agreement between the parties expired and a new or revised agreement was entered into with a term running from June 27, 1988 to April 30, 1991. The negotiations for the new or renewed agreement took place during the spring of 1988. In order to carry the increased costs of the new agreement, the contractor asked for an amendment to the contract involving higher regular, overtime and statutory holiday hourly rates, and other adjustments, in a letter to Air Canada dated June 19, 1988. Air Canada agreed to changes in the contract and Aeroguard then proceeded to sign the collective agreement with the IAM. Similar contract adjustments had been agreed to at least once before, when a former contractor, Burns, in 1986 increased the remuneration for its staff because it was allegedly having difficulty in recruiting.

The Board was told that from time to time, the following kinds of "special situations" had arisen during the carrying out of the contract:

- departure of flights would be delayed for one reason or another and the pre-board screening service would operate beyond the normal hours; Air Canada would authorize payment for the overtime involved after it had occurred; this would not be an authorization specifically for individuals to be paid overtime but an after-the-fact verification so that the contractor could bill and be paid at the overtime hour rate in the contract; employees would be paid by the contractor as per their particular situations, which might indeed be that they personally were working overtime under the terms of the collective agreement or an applicable regulation. It cannot be said that Air Canada "authorized employees' overtime work" per se;
- modifications to airline schedules, flight delays, special and charter flights all require the airlines at Terminal 2 to advise the management of the pre-board screening service when there may be changes in passenger flow and how large these changes will be so that staff can be deployed - or not - as the case may be and check-points are staffed only to the extent required by passenger flow;
- requirements that might cause existing practices to be altered permanently or temporarily would be handled as they arose via requests from the Terminal 2 airlines directed to the contractor's management personnel who would then direct the staff as they saw fit so that

those requirements would be met; Air Canada, as the designated representative or the other airlines did not normally give orders or instructions directly to the employees of Aeroguard;

- notwithstanding the apparent regulatory restrictions on the size of luggage or the number of pieces that a passenger may take through a check-point and bring on to an aircraft, Air Canada and the other airlines allow first-class and "business" or "executive" class passengers more leeway than is granted to others;
- occasionally, VIP's are taken directly on board aircraft, thus by-passing the screening check-point.

The evidence concerning the Aeroguard contract and its administration up to the time of its expiration shows that neither Air Canada nor any of the other airlines that signed the contract

- hired pre-board screening staff or had any involvement in the hiring process;
- had any involvement in training Metropol-Aeroguard employees or in evaluating their ongoing performance;
- scheduled the hours of individual employees, beyond notifying the contractor virtually on a daily basis as to the expected passenger departure volume for that day and generally when service would be required and when departure peaks would occur;
- had input into rates of pay and conditions of work beyond those already mentioned;

- had any authority to discipline pre-board screening employees; complaints from the public about individual employees were forwarded to the contractor to be acted upon by it;
- had any authority to dismiss employees;
- gave any direct orders to employees; the airlines made requests for specific things to managerial or supervisory staff, which implemented them via employees;
- had any connection with the IAM or any ongoing contact with the union, except in the unusual circumstances which will be referred to later in these reasons;
- had any responsibility to supply uniforms or equipment to the contractor;
- provided any ongoing administrative support to the contractor;
- had any involvement in the direct dealings between the contractor and Transport Canada in which the effectiveness of the screening system was regularly monitored.

Early in April 1989, as the expiration date of the Aeroguard contract approached, Air Canada's purchasing people asked six companies which were well-known in the security field to submit bids. Aeroguard and Executive were among the six. The specifications issued by Air Canada on behalf of itself and the Terminal 2 airlines provided for a new contract similar in virtually all

respects to that which was about to expire. The specifications did contain the following:

"Bidders should give recognition to current security screening employee's [sic] wages

Note: It is not Air Canada's intent to lower the Standard Wages of the present Security Screening Staff."

The tender call also was for a three-year contract.

The Board was told that this represented the response to the airlines' "understanding" with the Minister of Transport. No mention was made in the specifications of the "agreement" to establish a "senior guard" position in order to create a promotional avenue for regular guard staff. This position may, however, have been implied in the material in the specifications relating to "supervisors." In any event, the optimistic announcement in a press release issued by the Minister of Transport that there had been agreement on "proposals to improve the wages and working conditions of pre-board screening personnel at Canadian airports" does not appear to have been very much in the minds of the Air Canada purchasing people when they devised and circulated the specifications for the new contract.

The Board was told that while there was nothing in the tender documents, including the draft agreement, to suggest that a new contractor was expected to retain the outgoing contractor's staff, the assumption was that a new contractor would want to keep these experienced people in order to minimize costs and disruption. There was, of course, nothing so reasonable in the specifications as a requirement that the new contractor would be expected to

recognize the union already holding the bargaining rights for the employees of the outgoing contractor - if not the existing collective agreement between the union and that ongoing contractor. (Were something like that required to be included in all pre-board screening contracts, the travelling public, at least, would be saved much grief over time, not to mention employees who suffer from notorious conditions of employment instability and insecurity.)

Pre-board screening contracts are awarded on the basis of the lowest cost. When the tenders were received in this instance from five of the six companies invited to bid, it was clear that Executive was the lowest bidder by a very substantial sum of money. Aeroguard was in the middle of the pack. Executive was awarded the contract for a three-year term.

Executive is a firm with considerable experience, particularly in Western Canada, in providing the pre-board screening function. In the West, it has entered into collective agreements with the Teamsters Union.

Just before making its bid on the Terminal 2 contract, Executive held negotiations with Teamsters Local Union 938, voluntarily recognized that union and entered into a complete collective agreement with it. It thus knew what its employment costs would be when it filed its tender. So, of course, did Aeroguard because of its existing collective agreement with the IAM. (That such a relationship and a collective agreement between Executive and the Teamsters existed long before any persons were actually employed is not in principle contrary to the Canada Labour Code. Voluntary recognition is an accepted employer-union practice under the Canada Labour Code. The

safeguard against its abuse is that employees have an immediate "out" once they do arrive on the scene. They may invoke section 38(3) and seek a declaration from the Board that the union is not entitled to represent them. Such a declaration normally flows from a vote of the employees wherein a majority state they are against the union.)

The wage rates provided for in the Teamsters/Executive collective agreement were lower than those in the IAM/Aeroguard collective agreement. Executive's bid was based on those lower rates; Executive does not appear to have noted the wage rate "requirement" in the specifications cited on page 18. Nor does Air Canada appear to have paid much attention at first to its own specification "requirement" or indeed to have tried in any way to police this aspect of the bid. For, somewhat later, after the contract had been awarded, Air Canada became aware of the discrepancy. It sought and received agreement from Executive that the pay of persons who had previously been employed by Aeroguard would be maintained and not reduced to the level of the Teamsters collective agreement. The price of this belated effort to assure compliance with its own specifications was an adjustment upwards in the contract price by some \$100,000 per year.

Air Canada was concerned about the capability of Executive to take over the pre-board screening function in mid-July and to run it effectively from the beginning of the new contract. That capability came down, in the final analysis, to Executive having enough people who could do the job. At some point between early April and mid-June, Air Canada officials thought they had extracted from Executive a commitment to hire at least 85% of the outgoing contractor's staff and announced this in writing and orally

on more than one occasion during June and July 1989. Executive was certain that no such undertaking had ever been made. John Grady, the company's president, testified that he had assured Air Canada officials that Executive would make every effort, but would not guarantee, to hire 85% of those Aeroguard employees who applied for work. The local Toronto manager, Jeremy Spindlove, had no knowledge, while he was engaged in the hiring process prior to mid-July 1989, that such an "assurance" had even been given. He continued throughout the hearing to deny that Executive had taken measures of any kind to try to hire any percentage of Aeroguard staff.

On June 7, 1989, J.B. Warford, Aeroguard's branch manager, advised all employees at Terminal 2 in writing that Aeroguard would not have the pre-board screening contract after July 16, 1989. As of that date, all the firm's employees at Terminal 2 would be laid off.

The IAM, having communicated with Executive, ascertained that the latter would not be picking up the IAM/Aeroguard collective agreement since it was already into a relationship with Teamsters Local Union 938. Not surprisingly, employees of Aeroguard became concerned over what was to become of them. Initially, there were no answers to their questions; when answers began to be given, employees judged them unsatisfactory. Again, not surprisingly, Aeroguard was angry about losing the contract and did not go out of its way to seek means of reassuring its employees - means which were probably not available to it, in any case. Executive took the position that these people were not its employees yet and was equally unwilling to provide advance reassurances.

Employee concerns, not unnaturally, became overt unrest which resulted in two wildcat strikes, one of which at the beginning of July 1989, was judged by the Board to be unlawful and which was ended when the Board applied the law and ordered the employees back to work.

It fell to some extent upon Air Canada to attempt to resolve many major problems from mid-June 1989 onwards so that the pre-board screening function would continue until Executive actually began to provide it in mid-July. The evidence is clear that Aeroguard, because of its anger at losing the contract, far from acting like an entity under common direction and control with Air Canada, reacted as uncooperatively during the last few weeks of its outgoing contract as it could possibly do and still provide the services under the contract.

Executive did not assume the staff of Aeroguard or any of the equipment, physical assets or anything else used by Aeroguard in carrying out its contract. There was no contract between it and Aeroguard from the time it began the process of building its own work-force and preparing to provide the pre-board screening service in mid-July. There was not then, nor was there later, any transfer of personnel records from Aeroguard to Executive. In order to create a capability to carry out its contract, the latter firm had to start virtually from scratch. In short, there was no contact, no communication and no transaction of any kind between Aeroguard and Executive that led to the latter carrying out the function that the former had done.

Executive began advertising in the press for employees around June 10 and 11, 1989 and started to receive and process applications on June 12. Jeremy Spindlove, then

Toronto operations manager, described to the Board how he went about this activity. He stated that applicants began appearing in large numbers during the week of June 12 at an office opened by Executive not far from Pearson International Airport. These persons were given an Executive application form, a form on which to apply for the Ontario Provincial Police (OPP) security guard licence and other documents, including a Teamsters membership application. To groups of 10 to 20 applicants, Mr. Spindlove gave 10-minute briefings, in which he described the wage rates and benefits provided for in the Teamsters collective agreement. Then he interviewed each applicant individually; if the person was an Aeroguard employee, he ascertained via the last pay stub, which he asked the person to produce for him, what that individual's pay rate was, so that the commitment to maintain Aeroguard people at their existing wage level could be met. Nobody from Air Canada or the other Terminal 2 airlines was present during this whole exercise or was involved in any way in the actual hiring process.

Mr. Spindlove estimated that he had received about 700 applications between June 12 and July 17. The decision whether or not to hire was made by him on behalf of Executive following each interview. Nobody outside the company was involved in any way in this decision-making.

On June 15, the IAM's chief business agent, Steve Vody, telephoned John Grady, president of Executive, and according to Mr. Grady conversed with him for about 30 seconds. Mr. Grady told Mr. Vody that Executive had a collective agreement with the Teamsters, that Executive would welcome applications from Aeroguard employees and that Executive would pay Aeroguard people it hired at their

existing wage rate.

On June 19, John Muller, a security guard who was active in the IAM and, in fact, was chief steward for the unit, appeared at the Executive office and met Mr. Spindlove. According to Mr. Miller, he filled in the required applications. (Since the OPP security guard licence and the Transport Canada pass were given to persons not in their own right but as employees of a specific security firm, new applications had to be made and new licences or permits had to be obtained when Executive took over the screening function.) He told the Board that he allowed Mr. Spindlove to copy his Transport Canada ID; however, he understood that the OPP did not allow its licence to be put in anybody else's hands. Hence, he refused to let Mr. Spindlove take it and copy it. He denied that he was "abrupt" or "aggressive and hostile" with Mr. Spindlove.

The latter's version was that he had no idea Mr. Miller was an IAM supporter, let alone chief steward, but he did know he was an Aeroguard employee when he met him on June 19. He did not even know Mr. Miller's name at that point. He asked to see Mr. Miller's Transport Canada pass and his OPP licence. Mr. Miller showed him the pass but said, "No, you're not entitled to see the OPP licence; I only have to show that to a police officer."

Mr. Spindlove testified that he decided then and there, without knowing anything more about Mr. Miller, not to hire him because he felt he had a poor attitude. He did decide to hire a woman Aeroguard employee who accompanied Mr. Miller at that time.

The Board was told that by this time - June 19 - Aeroguard

employees had not been particularly quick to file applications with the contractor-to-be, Executive. In response to Aeroguard employee questions about the future and general rumblings about the changeover, and because of his own concerns that the changeover should be accomplished without disruption, A.B. Graham, Air Canada's general manager - Toronto Airport, sent the following memorandum to all Aeroguard employees at Terminal 2 on June 20, 1989:

"The purpose of my letter, as Administrator of the Passenger Screening Security Contract, is to clarify the status of the new contract for the screening process at Terminal II at Lester B. Pearson International Airport.

As preparations are being made to introduce this agreement, there seems to have been significant misunderstanding. Our desire is to execute a smooth transition from Aeroguard to Executive Security Services.

I would like to reassure you that, under the new contract, a minimum of 85% of the current Terminal II workforce will be guaranteed their jobs at their current salary rate, in recognition of their accreditation and work experience. The change-over date to Executive Security will be July 16, 1989.

Furthermore, Executive Security will be conducting information sessions and employment processing in Conference Room 'A' on the third floor of Terminal II, commencing this evening, June 20/89, at 1900 hrs, as well as on Wednesday, June 21/89, at 1000 hrs., 1500 hrs., and 1900 hrs. in Conference Room 'B'.

Collectively, we look forward to a smooth transition."

Mr. Graham testified that he actually sent this out at the request of chief steward Miller.

The June 20 meeting took place with 20 to 25 Aeroguard employees present. Mr. Spindlove presided and described it as an information session. He testified that Mr. Miller announced that he represented the employees present and that he would be asking questions on everybody's behalf.

There was then an acrimonious exchange between the two and Mr. Miller departed. Mr. Spindlove told the Board that Mr. Miller was not asked to leave.

According to Mr. Miller, he did tell Mr. Spindlove and the other employees that he represented the union, the employees and others who could not be present at the meeting. He asked questions about the pay and conditions offered by Executive and wanted to know what union, if any, was recognized by the new contractor. He testified that Mr. Spindlove or somebody else from Executive told him this was not a union meeting and they were not present to answer questions of this kind. He was asked to leave and he did so.

Mr. Miller's recollections of the meeting may not have been as precise as he wished the Board to believe: he was certain Mr. Graham was present for it, while the facts suggest otherwise. Mr. Graham testified that he was not at the meeting; he was in Montréal that evening and did not return to Pearson International Airport until early on June 21. Mr. Spindlove confirmed that Mr. Graham was not present. For what it may be worth over all, the Board inclines toward the Graham-Spindlove version.

In any event, the June 20 meeting did not calm the concerns of Aeroguard employees. According to Mr. Miller, employees decided early on the morning of June 21 to walk out because they were not getting answers to their questions. One can readily imagine the chaos that this created for would-be travellers.

By this time, Mr. Graham had arrived back from Montréal. It is not an over-statement to suggest that he was almost

desperate to see the walkout end and passenger departures resume. A meeting was arranged between Mr. Graham, Mr. Spindlove, Mr. Miller and several other Aeroguard employees. According to Mr. Miller, Mr. Graham said he guaranteed that 85% of the Aeroguard employees would be hired. He secured from Mr. Spindlove the following letter, which he later showed to Mr. Miller and representatives of the employees:

"June 21, 1989

*Mr. A.B. Graham
General Manager - Toronto Airport
Air Canada
Lester B. Pearson International Airport
Terminal II*

Dear Mr. Graham:

Executive Security Services is currently hiring staff to fulfil its contract for start-up date of July 16, 1989.

To this end, Executive Security are prepared to employ Aeroguard Security staff currently employed at Terminal II, at their current rate of pay. No employee will receive a reduction in pay or benefits.

All those employees who wish to join our company will be required to complete the necessary paperwork before the changeover date and also provide a copy of their most recent pay slip to Executive Security.

Yours truly,

(signed)

Jeremy Spindlove"

It will be noted that Mr. Spindlove made no mention of any 85% hiring guarantee. In fact, he refused to make such a guarantee; this, in itself, suggests that Executive was outside Air Canada's "control or direction."

During the week before July 30, the IAM launched a campaign at Terminal 2 to obtain public support for retention of the existing Aeroguard contract until the government could actually take over and provide the pre-board screening service directly. The week ended, however, with a general walkout by the Aeroguard employees.

Mr. Miller told the Board that he had finished his shift on June 30 and had gone home, to begin two weeks of holidays. He was called and advised that a strike had begun. There followed several meetings between him and several of his Aeroguard colleagues on the one hand and Mr. Graham of Air Canada and Aeroguard and Executive officials on the other.

This was the July 1 holiday week-end and air travel was at a seasonal peak. The walkout meant that passengers could not be screened and could not board aircraft. The Board was told that special measures were taken to train persons to replace the strikers but that the situation over the week-end was extremely difficult for the travelling public. During the course of one meeting, Mr. Graham queried Mr. Miller as to what it would take to persuade the Aeroguard employees to go back to work. The Board heard from Mr. Graham that Mr. Miller suggested a pay rate of \$9.50 an hour would turn the tide and from Mr. Miller that this rate was Mr. Graham's idea. Nothing, however, came of this exchange and on July 1, a panel of the Canada Labour Relations Board responded to an application filed by the outgoing contractor, Aeroguard. The Board found that the strike was unlawful and ordered the Aeroguard employees to return to work.

A further illustration of the absence of "control or direction" by Air Canada over Aeroguard arose at the same time. Air Canada drafted the following memorandum for Aeroguard to give to its employees:

"The Board has found that the concerted refusal of Aeroguard workers to report to work is an unlawful strike and has ordered that you return to work as quickly as possible. You should be aware that failure to obey this order could result in penalties and discipline including termination of employment. We therefore urge you to report to your job in accordance with your present shift schedule immediately.

As you know Executive Security is preparing to take over security services at Pearson International Airport. Executive Security is interested in conducting interviews with each and every one of you and anticipates hiring the vast majority of the present Aeroguard staff at their current wage rates. Interviews by Executive Security personnel will be conducted beginning the first full shift following an orderly return to work. To ensure you are considered for employment with Executive Security it is of the utmost importance that you report immediately back to work in accordance with your present Aeroguard shift schedule."

Aeroguard, according to its regional manager, James Warford, refused to give this memo to employees. Over the succeeding two weeks, up to the point when Executive actually began to operate the pre-board screening service, there were exchanges of acrimonious correspondence between Mr. Graham and Mr. Warford which further confirmed that by that time Aeroguard was well outside the realm of a common Air Canada/Aeroguard "control or direction" - if it ever was inside that realm earlier in the life of the contract.

VI

"Common control or direction" constitutes one of the several criteria which must be met before the Board may make a single employer declaration under section 35, as the IAM would have this panel do in respect, first, of Air Canada and Aeroguard. These criteria have been cited in numerous previous Board decisions. (Please see The Canadian Press et al. (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60); British Columbia Telephone Company and Canadian Telephones and Supplies Ltd. (1977), 24 di 164; [1978] 1 Can LRBR 236; and 78 CLLC 16,122 (CLRB no. 108); more recently, Muir's Cartage Ltd. and Canada Post Corporation (1992), 92 CLLC 16,060 (CLRB no. 955); Beam Transport (1980) Ltd. and Brentwood Transport Ltd. (1988), 74 di 46 (CLRB. no. 689); and Ottawa-Carleton Regional Transit Commission et al. (1988), 72 di 189; and 19 CLRBR (NS) 165 (CLRB no. 670).)

To paraphrase, each of the entities which an applicant seeks to have the Board bind together as a single employer must be a federal work, undertaking or business. (That was certainly the case here with Air Canada and with Aeroguard in its manifestation as Air Canada's pre-board screening contractor.) They must be associated or related. (Obviously they are, since Air Canada and Aeroguard were in a contractual relationship whereby Aeroguard provided the pre-board screening services imposed upon Air Canada and the other carriers operating out of Terminal 2.) There must be present two or more employers and there are. Their businesses must be under "common control or direction."

These reasons have outlined the main points in the contract between Air Canada and Aeroguard (and between the other carriers at Terminal 2 and Aeroguard). Those points and the detailed nature of that contract do not need to be repeated for the purposes of this analysis. It is clear, following an examination, that a real contract existed by which Aeroguard provided certain services to Air Canada and the other carriers. Operating within the terms of the contract Aeroguard was autonomous; it was the employer that had fundamental or decisive control over the employees.

In all of the Board's previous cases, the factual situation most akin to the one here is that found in Ottawa-Carleton Regional Transit Commission, supra. If anything, the facts here make for a stronger case that Air Canada and Aeroguard, although bound by the terms of a detailed contract and working side-by-side on a day-to-day basis in specific yet distinct roles, were nevertheless not under "common direction or control" within the meaning and for the purposes of section 35 of the Code.

The Board must therefore dismiss the single employer application in respect of Air Canada and Aeroguard. Since the evidence adduced at the hearing was to the effect that the post-July 1989 contract between Air Canada (and the other carriers) and Executive is essentially the same, as are all other aspects of the relationships, the Board cannot conclude that Air Canada and Executive can be treated as a single employer.

Since neither the Air Canada/Aeroguard relationship nor the Air Canada/Executive relationship qualifies either of them to be deemed to be a single employer pursuant to section 35

of the Code, there cannot have been a sale of business within the meaning of section 44 between them.

At the same time, the evidence is clear that there was no sale on any other basis. From the point many years ago when the law required Air Canada and all other airlines to provide for pre-board screening of all departing passengers at Terminal 2 and elsewhere, Air Canada as the "designated representative" at Terminal 2, and the other airlines operating there, never performed this function directly. Instead, Air Canada and the others invariably entered into a contract with another entity which employed persons to perform this function. The initial contracting out of this responsibility by Air Canada was in no sense a sale under section 44 akin to that found by the Board in such decisions as Bernshine Mobile Maintenance Ltd. (1984), 56 di 83; 7 CLRBR (NS) 21; and 84 CLLC 16,036 (CLRB no. 465); and Bradley Services Ltd. et al. (1986), 65 di 111; 13 CLRBR (NS) 256; and 86 CLLC 16,036 (CLRB no. 570). When one contract reached the end of its term, Air Canada (as the designated representative) normally issued specifications and called tenders for a new contract over a new term. Because it was the lowest bidder, Executive displaced Aeroguard in 1989.

The term "sell" in section 44 is defined in a most open-ended way. It includes any "disposition" of the business or if any part thereof. Since, however, Air Canada's original contracting out of the function in the years before Aeroguard and Executive appeared on the scene was in no way a "disposition" of a part of Air Canada's business

since Air Canada had never actually performed this function directly, the whole chain of transactions which ensued between Air Canada and the various employers which held the contract and performed the function from time to time cannot be seen as ongoing dispositions of the business by Air Canada - and therefore as repeated sales of the business - akin to the situation that was reported upon in the Board's decision in Bradley Services. An application of the Bradley Services interpretation of the Code to the facts here would stretch section 44 beyond the breaking point - at least as it is currently written.

In this case, Aeroguard lost the contract and lost the business; Executive won the contract and began to do the business. It was not Aeroguard's business that Executive began to do. That business evaporated into nothingness at Terminal 2 when the Aeroguard contract concluded. Executive in effect established a new business so that it could perform the functions required under its contract.

The Board dismisses the IAM's applications in files 560-224 and 585-350.

The IAM's bargaining rights vis-à-vis Aeroguard did not continue at Terminal 2 vis-à-vis Executive because no sale took place. Indeed, as has already been noted, Executive began to perform the pre-board screening contract after July 16, 1989 with employees whose bargaining agent was Teamsters Local Union 938, as a result of a collective agreement entered into in April 1989. There is no evidence that Air Canada was involved in any way in the conclusion

of this collective agreement by Executive and the Teamsters. At the same time, there was nothing illegitimate about this transaction per se and there is no evidence that Executive and the Teamsters have subsequently violated the Code. When Executive and the Teamsters entered into the collective agreement, no other union held overlapping bargaining rights. Nor had they any reason to suspect, based upon the history of these contract changes across Canada, that the IAM would later assert that there had been a sale and that it owned these bargaining rights. There is no evidence to support the allegation of the IAM that by entering into a collective agreement with the Teamsters, Executive participated in the administration or representation of employees by a trade union and contributed support to that trade union, contrary to sections 94(1)(a) and (b). This part of the complaint in file 745-3303 is therefore dismissed. More will be said later about the allegation in file 745-3303 that Executive violated other parts of sections 94 and 96 when it did not employ certain former Aeroguard employees.

In file 750-20, the IAM asked for consent to prosecute the respondent employers, pursuant to section 104, "for their refusal to be bound by the collective agreement entered into in respect of this bargaining unit and thereby violating the provisions of Section 56 of the Code." As the Board has already indicated, it finds that the Aeroguard/IAM collective agreement does not apply to Executive or its employees. The latter are covered by the Executive/Teamsters collective agreement. There has been no violation of the Code and this application must therefore be dismissed.

As reported on page 4 of these reasons, the IAM obtained ministerial consent to complain to the Board (in file 745-3385) that Air Canada and Executive had violated section 94(3)(g) when Executive concluded a collective agreement with the Teamsters while the IAM was allegedly already the bargaining agent for that unit of employees. As already indicated in these reasons, the Board does not find these allegations to be factually supported and dismisses the complaint. It was originally alleged as well that the Teamsters violated sections 95(a) and (b) when they bargained with Executive and entered into their collective agreement. During the course of the hearing, the IAM withdrew this part of the complaint.

VII

The Board was told that some 81 out of 147 Aeroguard staff were hired by Executive. There were no applications from 35; another 31 were refused employment. Executive employed 66 part-time employees who were formerly with Aeroguard and decided not to hire 3; no applications were received from 45 part-timers.

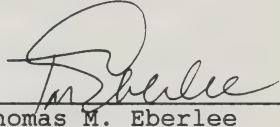
Aeroguard's regional manager, James Warford, testified that Air Canada general manager Graham asked him for a list of the employees who were behind the unlawful walkout over the July 1 holiday week-end, so that he could be sure they were not employed in the future. Mr. Graham denied under oath that he had made such a request and such a statement. In the final analysis, whether or not Mr. Graham did ask for a list of names makes no difference to the Board's

conclusions here, since, according to Mr. Warford, no list was provided; the matter was never raised again and, in any event, the evidence shows that Air Canada played no part in the hiring of staff by Executive.

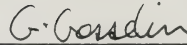
Executive's decision not to hire chief steward John Miller is, however, another matter entirely. These reasons have already set out certain facts concerning his encounters with Mr. Spindlove of Executive and have recorded Mr. Spindlove's assertion that he decided on June 19, 1989, after his first meeting with Mr. Miller, not to hire him. Mr. Miller told the Board that he was informed by another Executive supervisor a few days later that he would be hired. It was not until July 14, 1989, at least two weeks after Mr. Miller had become well known to Mr. Spindlove and Executive's supervisors as the IAM chief steward and a major player in all of the events of late June and early July 1989, that Mr. Miller was sent a form letter announcing that his application had been received and was being reviewed. He was told that if Executive decided to offer him a job, he would be so advised in writing. He never received this letter, nor was he offered a job by Executive.

The Board concludes that, on a balance of probabilities, Mr. Miller was not offered a job because of his activities on behalf of the IAM. This denial of employment was a violation of section 94(3)(a)(i) of the Code. The Board was presented with no evidence that could lead it to conclude there were others denied employment on the same basis as Mr. Miller.

The latter told the Board that he continued to work for Aeroguard as a security guard on another contract at Pearson International Airport for almost a year after the events described in these reasons. He then left Aeroguard for what he described as a better job. The evidence does not disclose any loss suffered by Mr. Miller which requires to be remedied. It will be sufficient, then, that the Board simply record its determination that Executive, through its denial of employment to Mr. Miller, breached section 94(3)(a)(i) of the Code.

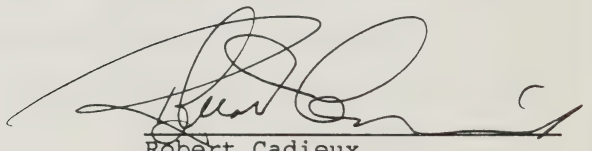


Thomas M. Eberlee
Vice-Chairman



Ginette Gosselin
Member

Except as modified by the
attached dissent.



Robert Cadieux
Member

ISSUED at Ottawa, this 25th day of February 1993.

DISSENTING OPINION OF GINETTE GOSSELIN, MEMBER

I concur with the decision to dismiss the application for a declaration of single employer, but for reasons, different from those expressed by the majority. I do not agree with my colleagues' interpretation of the provisions of section 35 relating to "common control or direction," nor with their interpretation of the facts of the instant case that lead them to conclude that this condition is not met. Given my conclusion that a single employer declaration would not be warranted in light of all the circumstances of this case, I do not propose to review in detail each and every condition set out in section 35 of the Code. Nonetheless, I wish to comment briefly on my reasons to disassociate myself with the reasons of the majority in this respect.

The provisions of section 35 bear repeating to illustrate my disagreement with my colleagues:

"35. Where, in the opinion of the Board, associated or related federal works, undertakings or businesses are operated by two or more employers having common control or direction, the Board may, after affording to the employers a reasonable opportunity to make representations, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business."

I have had the occasion in another decision, Muir's Cartage Ltd. (1992), 92 CLLC 16,060 (CLRB no. 955), to state that the proper test to be applied before a single employer declaration can be made has been set out in Murray Hill Limousine Service Ltd. et al. (1988), 74 di 127 (CLRB no. 699)). It goes as follows:

1. two or more enterprises, i.e. businesses,
2. under federal jurisdiction,
3. associated or related,
4. of which at least two, but not necessarily all, are employers (*Emde Trucking Ltd., supra*),

5. *the said businesses being operated by employers having common direction or control over them."*

(page 145)

It is basically a test in which conditions must be met for the Board to exercise its discretion under section 35, and actually issue a single employer declaration. My first reservation is over the majority's application of the fifth criterion to the facts on hand. It is my respectful opinion that my colleagues' conclusion that Aeroguard and Air Canada were not jointly running a business of security services at Pearson, is based on the following assertion:

"... It is clear, following an examination, that a real contract existed by which Aeroguard provided certain services to Air Canada and the other carriers. Operating within the terms of the contract Aeroguard was autonomous; it was the employer that had fundamental or decisive control over the employees."

I do not consider decisive the fact that Aeroguard was a real employer and had decisive control over the employees. The question is rather to decide whether some other employer would also have had such decisive control over those employees' conditions of employment. The majority rules out such a possibility on the basis that a "real contract" existed between Aeroguard and Air Canada. In my view, common control or direction is a notion that must be examined more from the perspective of the effects of a contract, than of its terms. To restrict one's examination to the terms of a contract may be tantamount to denying the effects of its fulfillment when those effects may precisely be to split the control or direction of a business between two employers. In my view the five criteria set forth in section 35 have to be applied on a strictly objective basis. The way the majority is applying the fifth requirement of section 35 has in my

respectful opinion the effect of giving the Board a discretion it does not have under the Code.

The only discretion section 35 confers on the Board has to do with the opportunity to make a single employer declaration when the five conditions are met.

The Board may refuse to make the declaration, even when it concludes that the five conditions are met, if it feels that the purpose of section 35 is not served (The Canadian Press et al. (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60); British Columbia Telephone Company and Canadian Telephone and Supplies Ltd. (1977), 24 di 164; [1978] 1 Can LRBR 236; and 78 CLLC 16,122 (CLRB no. 108); Calgary Television Limited and Lethbridge Television Limited (1977), 25 di 399; and [1978] 1 Can LRBR 532 (CLRB no. 118); Air Canada et al. (1989), 79 di 98; 7 CLRBR (2d) 252; and 90 CLLC 16,008 (CLRB no. 771); Muir's Cartage Ltd., supra; and Nationair (Nolisair International Inc.) et autres (1992), as yet unreported CLRB decision no. 960).

The generally recognized purpose of section 35 is the following:

"The purpose of section 35 has always guided the exercise of the Board's discretion in these matters. That purpose is aimed at preventing the undermining or evading of bargaining rights through corporate or business arrangements (British Columbia Telephone Company and Canadian Telephones and Supplies Ltd., supra; and Beam Transport (1980) Ltd. and Brentwood Transport Ltd. (1988), 74 di 46 (CLRB no. 689).

Section 35 is not aimed at enhancing existing bargaining rights (See British Columbia Telephone Company and Canadian Telephones and Supplies Ltd., supra). Its purpose is remedial in nature. It is designed to ensure that employers only distinct in appearance do not succeed in circumventing their obligations under the Code by resorting to corporate restructuring or other types of business arrangements:

'... It was, after all, to prevent a management from escaping collective bargaining obligations owed under one corporate entity by transferring work to another controlled entity that Parliament put section 133 into the statute. ...'"

(Air Canada et al., supra, pages 118; 271; and 14,098)

This section is also designed to prevent bargaining rights from being otherwise compromised:

"The union relies upon an argument in favour of allowing natural bargaining structures to emerge. This is a legitimate secondary use of section 133. ..."

(Calgary Television, supra, pages 405; and 537)

Its purpose is therefore essentially to prevent the employees' right to collective bargaining from being extinguished or jeopardized by the employers' actions. It is not aimed at artificially extending bargaining rights.

In the instant case, the IAM never raised section 35 before it negotiated and signed a collective agreement with Aeroguard only. Like Aeroguard, it appeared satisfied with a one-to-one bargaining relationship even though it knew that Aeroguard could lose its contract at Terminal 2 if ever the airlines so decided. The IAM cannot argue in my opinion that the change of contractor or even the mere possibility of such a change upon expiry of the contract was an unexpected or unforeseen development that might have taken it by surprise. On the other hand, there is no evidence to suggest that the choice of Executive Security Services to replace Aeroguard was influenced by some desire to oust the IAM or terminate the exercise of collective bargaining by the security guards working at Pearson airport. As we know, those employees now working for Executive form a bargaining unit represented by the Teamsters.

In those circumstances, I consider that a declaration of single employer would not serve the purpose of section 35. There is therefore no need for the Board to determine whether Air Canada and Aeroguard, and Air Canada and Executive Security Services, successively constituted a single employer.

It is for these reasons that I would dismiss the section 35 application.

G. Gosselin

Ginette Gosselin
Member

ISSUED at Ottawa this 25th day of February 1993

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Summary

Hudson Bay Mining and Smelting Co., Ltd., applicant, and United Steelworkers of America, respondent.

Board's File: 530-2128

Decision No.: 999

Application for reconsideration pursuant to section 18 of the Canada Labour Code (Part I - Industrial Relations) of decision no. 956 dealing with the validity of membership evidence.

Sitting in plenary session, the Board had to determine whether the \$5.00 payment complied with section 24 of its Regulations. In the course of a renewed organizing campaign, the union had refunded the sum of \$5.00 to the employees who had originally paid that sum and signed their initial membership cards. The money was only refunded to those employees who signed a second membership application and then repaid the money to the union as the minimum \$5.00 payment. The original panel found that such payment met the requirements of section 24 of the Regulations and accepted the membership evidence tendered by the union in support of its application for certification.

A 12 member majority of the plenary session held that such payment did not comply with the requirements set out in section 24 of its Regulations for two reasons. First, by using the union's refunded money, the employees had not personally made a real payment. Second, the only real payment was made by the employees during the first organizing campaign, i.e. more than six months before the date of the application for certification and, therefore, had not been made within the time prescribed by section 24 of the Regulations.

The majority reaffirmed the importance of the requirements set out in its Regulations and their rigorous application. The \$5.00 payment requirement under the Regulations

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Résumé

Hudson Bay Mining and Smelting Co., Ltd., requérante, et Métallurgistes unis d'Amérique, syndicat intimé.

Dossier du Conseil: 530-2128

Décision n° 999

Demande présentée en vertu de l'article 18 du Code canadien du travail (Partie I - Relations du travail) en vue de faire réexaminer la décision n° 956 concernant la validité de la preuve d'adhésion.

Siégeant en séance plénière, le Conseil devait déterminer si le paiement de 5 \$ se conformait à l'article 24 du Règlement. Pendant une nouvelle campagne de recrutement, le syndicat avait remis la somme de 5 \$ aux employés qui avaient déjà versé cette somme et qui avaient signé une première carte de membre. L'argent n'a été remis qu'aux employés qui avaient signé une deuxième carte de membre; ces employés avaient par la suite remis l'argent au syndicat en guise de frais d'adhésion. Le banc initial a jugé que ce paiement satisfaisait aux exigences de l'article 24 du Règlement et a accepté la preuve d'adhésion soumise par le syndicat à l'appui de sa demande d'accréditation.

La majorité du Conseil, composée de 12 membres, a jugé que ce paiement ne respectait pas les exigences prévues à l'article 24 du Règlement pour deux raisons. En premier lieu, en se servant de l'argent remis par le syndicat, les employés n'avaient pas effectué personnellement un véritable paiement. En deuxième lieu, le seul véritable paiement avait été effectué pendant la première campagne de recrutement, soit plus de six mois avant la date de la demande d'accréditation et, par conséquent, n'avait pas été effectué dans les délais prescrits par l'article 24 du Règlement.

La majorité a fait ressortir l'importance des exigences prévues par le Règlement et de son application rigoureuse. Les 5 \$ exigés par le Règlement sont une question de fond

is a matter of substance, not a "technicality." The matter was therefore referred back to the original panel to be determined on the basis that that part of the membership evidence does not meet the requirements of the Board's Regulations.

Two dissenting members of the plenary session are of the view that the primary emphasis of the Board's inquiry should be on the wishes of the employees, not on "how" the sum of \$5.00 required by the Regulations passes from an employee to a trade union, particularly when the union is making no deliberate attempt to avoid the requirements of the Regulations. The process should be formalized as little as possible to afford unorganized workers a realistic opportunity to participate in collective bargaining.

et non de procédure. Par conséquent, l'affaire a donc été renvoyée au banc initial qui devra prendre une décision en tenant compte du fait que cette partie de la preuve d'adhésion ne respecte pas le Règlement du Conseil.

Les deux membres dissidents sont d'avis qu'une enquête menée par le Conseil devrait porter principalement sur les désirs des employés, et non sur la façon dont le versement des frais d'adhésion exigés s'effectue, surtout lorsque le syndicat ne tente pas délibérément de contourner les exigences prévues par le Règlement. Le processus devrait être moins formaliste pour pouvoir donner aux travailleurs non syndiqués une véritable possibilité de participer à la négociation collective.

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LES MOTIFS DE DÉCISION DU CCRT SONT MAINTENANT ACCESSIBLES DANS QUICKLAW.

Reasons for decision

Hudson Bay Mining and
Smelting Co., Ltd.,

applicant

and

United Steelworkers of
America,

respondent

Board File: 530-2128

This matter was considered by the full Board, sitting in plenary session, on December 7, 1992.

Appearances (on record)

Mr. D.H. Kells, for the applicant; and

Mr. Brian Shell, for the respondent.

These reasons for decision were written by Mr. J.F.W. Weatherill, Chairman.

This is an application, pursuant to section 18 of the Canada Labour Code, for reconsideration of the decision of the panel of the Board which dealt with the application for certification filed by the respondent trade union in this matter (Hudson Bay Mining and Smelting Co., Limited, as yet unreported CLRB decision no. 956).

On November 18, 1992, a reconsideration panel referred the present application to the full Board for determination, the question referred being put as follows:

"Having regard to the facts as found by the original panel, was their conclusion in compliance with the Rules and Regulations of the Board?"

The submissions of the parties which had been before the reconsideration panel were also before the full Board, and

no further representations were made, although the parties were given the opportunity to do so.

The facts of the matter are not in dispute. While the union had not disclosed to the Board all the facts relating to the signing of applications for membership and the payment of fees to the Board when the application for certification was initially filed, it did make a full and frank disclosure of those facts when the question was raised by the employer, and the original panel quite properly relied on the union's unchallenged statement of the circumstances in making its findings of fact.

The facts may be briefly summarized as follows. Some time prior to making the application for certification which was before the original panel, the union had conducted an organizing campaign among employees of the employer. A number of employees had signed applications for membership and made payments of five dollars to the union, as contemplated by the Board's Regulations. No application for certification was made at that time, however, and what would presumably have been valid evidence of membership in a certification application became stale by reason of the passage of time.

Later, in the course of a renewed organizing campaign, the union approached certain of those employees, most of whom had at least already given a further written confirmation of their desire to be represented, and obtained from them newly signed applications for membership. At the same time, the five dollars which had previously been paid was "refunded" to the employees in question, who then paid it over to the union as the minimum five-dollar payment required, under the Board's Regulations, to accompany the

signed application. The "refund" was made only to those persons who immediately paid the money over to the union as payment accompanying a membership application.

The question now before the full Board is whether or not such payment was, in the circumstances, in compliance with the Board's Regulations. It is the conclusion of the majority that it was not.

Sections 23 and 24 of the Canada Labour Relations Board Regulations, 1992, SOR/91-622, provide as follows:

"Evidence of Employees' Wishes"

23. In any application relating to bargaining rights,

(a) membership of an employee in a trade union is evidence that the employee wishes to be represented by the trade union as that employee's bargaining agent; and

(b) membership in a trade union of a majority of employees in a unit appropriate for collective bargaining is evidence that the majority of the employees in the bargaining unit wish to be represented by the trade union as their bargaining agent.

Evidence of Membership in a Trade Union

24. In any application relating to bargaining rights, the Board may accept as evidence of membership in a trade union evidence that a person

(a) has signed an application for membership in the trade union; and

(b) has paid at least five dollars to the trade union for or within the six-month period immediately before the date on which the application was filed."

The Board may exercise a limited discretion with respect to the evidence which it will accept as constituting satisfactory evidence of the wishes of employees to be represented by a trade union. Thus, where original evidence of membership is lost or destroyed, different evidence may be considered: see Radio CHNC Limitée, New

Carlisle, Quebec (1985), 63 di 26; 12 CLRBR (NS) 112; and 86 CLLC 16,009 (CLRB no. 537), upheld by Salariés de New Carlisle, Local 610 v. Syndicat des employés de CHNC New Carlisle (CNTU) et al. (1986), 79 N.R. 81; and 87 CLLC 14,048 (F.C.A.).

The instant case is not of that sort, and there has been no suggestion that the Board's usual requirements in respect of membership evidence do not apply. The scheme of the Code and the Board's Regulations in this respect are as follows: under section 28(c) of the Code, the Board must be satisfied that

"... a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent, ..."

By virtue of section 23 of the Regulations, evidence of trade union membership is evidence of employee wishes; and by virtue of section 24 of the Regulations, the Board may accept (notwithstanding whatever might be a trade union's regular requirements for membership) the evidence there described (that is, a signed application for membership together with the five-dollar payment) as evidence of membership in the trade union and thus as evidence of the wish to be represented by it. The question now before us is whether or not those requirements have been met in the circumstances of this case.

There can be no doubt that if a union organizer were simply to make a "gift" of five dollars to an employee, and were the employee then to hand that money back as a membership fee along with the signed application, that would not satisfy the Board's requirements. The employees must actually pay the money themselves (American Airlines

Incorporated (1981), 43 di 114; and [1981] 3 Can LRBR 90 (CLRB no. 301)).

Where a union organizer pays the fee for an employee, there cannot be said to be valid evidence of employee wishes, and the certification application may be dismissed (Air West Airlines Ltd. (Air West Operations Ltd.) (1980), 39 di 56; and [1980] 2 Can LRBR 197 (CLRB no. 231)).

In the instant case, the union in effect made a purported gift of five dollars to those employees who signed new membership cards. It was under no obligation to make such a payment. The case is different from a case involving Canada Post Corporation (Canada Post Corporation (1990), 80 di 209 (CLRB no. 798)), where, at the time the five dollars was collected and the applications for membership were signed, employees were advised that in the event the application for certification did not succeed, the money would be returned.

The payment there was a real one, and was appropriately relied on as evidence of genuine employee wishes in the particular circumstances which were before the Board in that case. That a real payment, in accordance with the Regulations, be made is a matter of substance and is not a "technicality". The rigorous application of the safeguards which these requirements constitute may be considered to be a quid pro quo for the Board's not holding a vote: see American Airlines, supra.

In Radio CHNC Limitée, New Carlisle, supra, one of the determinative issues was the moment at which the payment of the five-dollar fee was made, relative to the date of the application for certification. The Board states:

"Neither the application, the membership cards, nor any other document or submissions filed by the applicant enabled the Board to determine when it had collected the initiation fees. To that extent, the Board could have, without further ado, dismissed the application because of the applicant's failure to comply with section 27(2)(b) [now section 24(b)] of the Regulations. If, indeed, the Board 'may accept' evidence, there is no requirement that it 'seek out' evidence. However, because it wanted to determine what in fact had been done, the Board, on its own initiative, made further verifications with the applicant."

(pages 36; 123; and 14,078)

The Board concludes:

"The applicant union did not establish that it had obtained a sufficient number of valid memberships to meet the requirements of the Code. In fact, the exhibits on file and the testimony of the majority of the members of the applicant union established that these members did not pay their initiation fees within the six-month period preceding the filing of the application. The majority of members of the applicant union paid their initiation fees in January 1985, which was not 'within the six-month period immediately preceding the date of the filing of the application for certification,' this date being August 27, 1985."

(pages 37; 124; and 14,079)

With respect to the matter of the timely payment of the five-dollar fee, it is clear that the decision of the original panel in the instant case is contrary to that of the Board in Radio CHNC Limitée, New Carlisle, supra. That case has been accepted as expressing Board policy and as applying the Regulations. Since that case was decided, the Regulations have been revised, but the requirement of a five-dollar payment for or within the six-month period immediately before the date on which the application was filed has been retained. In the instant case, the majority of the whole Board is of the opinion that the conclusion of the original panel was not in compliance with the Regulations of the Board.

That the requirement of a five-dollar payment is more than a mere "technicality" is clear from what the Board had to say in Radio CHNC Limitée, New Carlisle, supra:

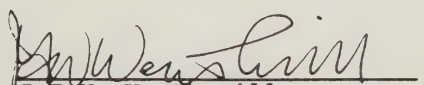
"Payment of an initiation fee of five dollars is a heavy enough outlay that, when taken together with the signing of a membership card, it leaves no doubt in the Board's mind that the employee wishes to join a union. Anyone who has ever dealt with union organization knows that workers are not interested, any more than are their employers, in throwing away their five dollars and that no one will pay five dollars without first asking himself why. The answer is then clear to him: he is paying five dollars to join a union, and soon. Clearly, the time factor is a consideration. The organizing union seeks members, and one of the major arguments used on employees is that certification is imminent. To allow the union to avoid, for all practical purposes, taking any action would be adverse to the objects of this legislation.

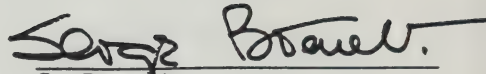
The Regulations have allowed unions longer than six months after collecting the dues to seek certification, but at a price, namely more extensive organization work, is required. In that case, the union must collect an initiation fee of more than five dollars which would be deemed to have been collected for a subsequent period to be defined."

(pages 38; 125; and 14,079)

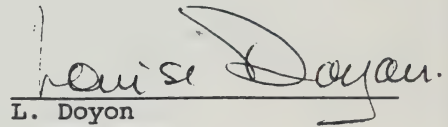
In the instant case, the real payment of the five dollars was made more than six months before the date of the application, and there has been no suggestion that it was made "for" any other period than the one in which it was made.

For the foregoing reasons, the matter is remitted to the original panel for determination on the basis that that part of the membership evidence at issue here does not meet the requirements of the Board's Regulations.

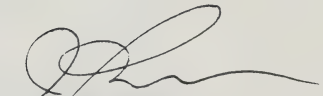

J.F.W. Weatherill
Chairman



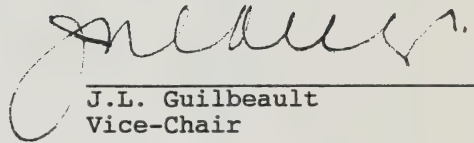
S. Brault
Vice-Chair



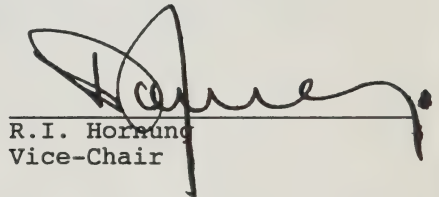
L. Doyon
Vice-Chair



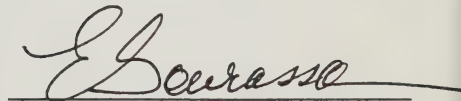
P. Morneault
Vice-Chair



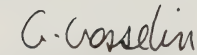
J.L. Guilbeault
Vice-Chair




R.I. Hornung
Vice-Chair



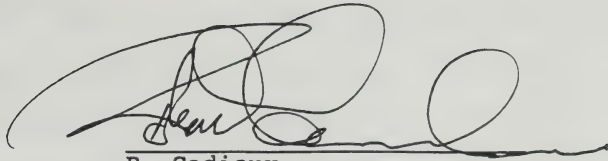
E. Bourassa
Member



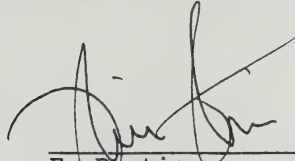
G. Gosselin
Member



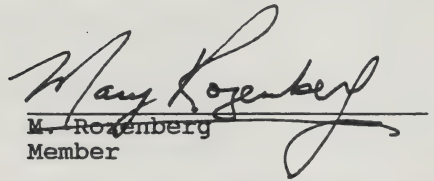
J.J. Alary
Member

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R. Cadieux
Member

A handwritten signature in black ink, consisting of a large 'F' followed by a series of loops and a horizontal line.

F. Bastien
Member

A handwritten signature in black ink, with the name 'M. Rosenberg' clearly legible, followed by a horizontal line.

M. Rosenberg
Member

DATED at Ottawa this 26 th day of February 1993.

Dissenting Opinion

We must dissent with respect to the conclusion of the majority of the full Board in file 530-2128 which states, at page 7, as follows:

"In the instant case, the real payment of the five dollars was made more than six months before the date of the application, and there has been no suggestion that it was made 'for' any other period than the one in which it was made.

For the foregoing reasons, the matter is remitted to the original panel for determination on the basis that that part of the membership evidence at issue here does not meet the requirements of the Board's Regulations."

With the greatest of respect, the conclusion and result stated above is not, in our opinion, consistent with the undisputed facts of the case under review.

The question referred to the Board, in plenary session, was as follows:

"Having regard to the facts as found by the original panel, was their conclusion in compliance with the Rules and Regulations of the Board?"

We continue to believe that the conclusion of the original panel was in compliance with the Rules and Regulations of the Board.

The purpose of the Regulations is to provide the Board with confirmation that employees who sign membership cards truly understand the significance of having done so and have confirmed that understanding by making a financial sacrifice. We agree that an amount of five dollars must be paid, and that it must be paid by the employees on their own behalf and in a timely manner.

The signed membership cards and the timely five-dollar payments are evidence on which the Board may rely to satisfy itself that employees wish to have a trade union represent them as bargaining agent for an appropriate bargaining unit.

The original panel did satisfy itself that the membership evidence complied with the Regulations. Every employee who wished to belong to the union paid five dollars within the requisite time period and with no conditions attached. The employees in question voluntarily signed membership cards three times. The employees were informed in writing that the original membership cards were stale-dated and that the sum of five dollars they originally paid was being returned to them. At the same time, they were asked to sign another membership card and pay five dollars. This they did. The union's actions were upfront, and the employees thoroughly understood what was going on.

With respect to the fact that those employees who did sign an original membership card, but did not sign a second time, were not approached a third time nor refunded five dollars, we do not believe this should have affected the consideration of the actual membership evidence before the original panel. The union had, during the original campaign, made no commitment to refund any five-dollar payments. That it chose to make a refund only to its known supporters at a later date does not, in our opinion, make those refunds, as characterized by the majority, "a gift". Again, on the undisputed evidence before the original panel, the union only made the refunds in question to ensure full compliance with the Board's Regulations rather than attempt to avoid compliance.

Section 24 of the Regulations sets out what criteria the Board accepts as evidence to establish union membership. We agree there is no discretion to vary those requirements. The original panel did not do so. It made a finding on the facts before it, that is, that the Regulations had been complied with. In our opinion the primary emphasis should be on what are the wishes of the employees. This should be particularly so when the union is making no deliberate attempt to avoid the requirements of the Regulations. The process should be deformalized as much as possible to afford unorganized workers a realistic opportunity to participate in collective bargaining.

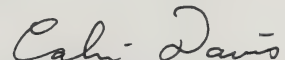
It is significant that not one employee wrote or petitioned the Board about the union's procedure. The objection came from the employer. In Alberta Wheat Pool (1991), as yet unreported CLRB decision no. 907, the employer filed a complaint about the union's organizing drive. In that particular decision, the Board had the following to say about an employer's role in an organizing drive:


"No discrepancies have been reported by our Officer and, most telling of all, there have been no complaints by employees on their own behalf about the Union's organizing campaign. This is where complaints of this nature should come from, not from employers who really have no business being in the realm of employee wishes (See K.D. Marine Transport Ltd. (1982), 51 di 130; and 83 CLIC 16,009 (CLRB no. 400)."

(page 17; emphasis added)

Clearly what occurs between a trade union and its prospective members during the time these individuals wish to exercise their rights is not something in which the employer should be involved.

We remain convinced, given the facts of this case, that there was full compliance with the Code and its Regulations. In fact, we feel that the original panel upheld the true objectives of Part I of the Canada Labour Code by ensuring that the prime consideration in any certification is the wishes of the employees. We would uphold the original decision.


Calvin Davis
Member


Michael Eayrs
Member

DATED at Ottawa this 26 th day of February 1993.

